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THE
New Instructor Clericalis,

STATING
The AUTHORITY, JURISDICTION, and
MODERN PRACTICE,

OF THE
Court of King's Bench.

By JOHN IMPEY, INNER-TEMPLE. K

The SIXTH EDITION Corrected;
With many MATERIAL ALTERATIONS, and CONSIDER-
ABLE ADDITIONS, including all the CASES in
PRACTICE to the End of the last Term.

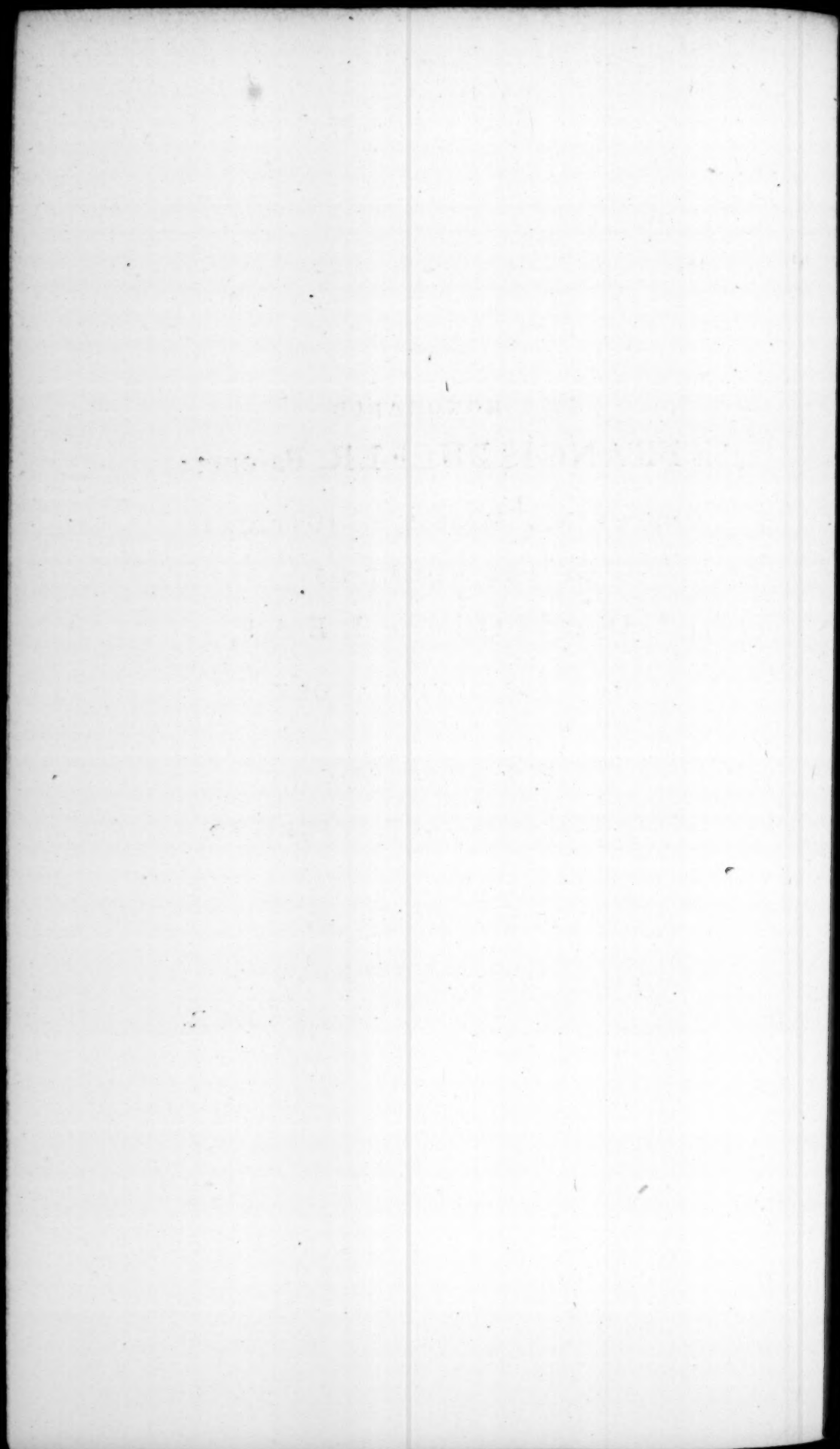
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TO
THE HONORABLE
Sir FRANCIS BULLER, Baronet;
ONE OF HIS MAJESTY'S JUSTICES
OF THE COURT OF
COMMON PLEAS,
THE FOLLOWING WORK
IS
(BY HIS PERMISSION)
MOST RESPECTFULLY INSCRIBED,
BY
HIS MOST OBEDIENT AND
OBLIGED HUMBLE SERVANT,
THE AUTHOR.



P R E F A C E.

THE Fifth Edition of the following Work which was received by the Profession with approbation, made its appearance five years ago; since which, the Author has employed much time and used great attention to make it still more worthy of reception.

In the present Edition there will be found many material alterations, and also *considerable additions*. The new Rules of Court are inserted, and the Adjudications continued down to the end of the last Term, most of the Cases in which are inserted in the Addenda, at the end of title *Error*, p. 752.

If any inaccuracies should yet remain, the Author trusts that the Profession will view them with their accustomed candor.

The

P R E F A C E.

The Author could not conclude without returning thanks to Master *Forster*, for much useful information received from him during the progress of the present, as well as the former Editions of this Work, and for the very liberal manner in which it was communicated.

THE
AUTHORITY and JURISDICTION
OF THE
COURT OF KING'S BENCH.

THE *primary* objects of the law are the *establishment of rights*, and the *prohibition of wrongs*; and to accomplish *the redress of injuries*, courts of justice are instituted in every civil society, in order to protect the *weak* from the insults of the *stronger*, by expounding and enforcing *those laws*, by which *rights* are *defined*, and *wrongs prohibited*. This remedy is therefore principally to be sought by application to these courts of justice, which, in all instances of an injury being committed, either inflicts a punishment on the *offender*, or gives a *recompense* to the *person injured*.

A court is defined to be a place wherein justice is Court defined. duly administered. *Co. Lit.* 58. And as, by our excellent constitution, the sole executive power of the laws is vested in the person of the king, it will follow, that all courts of justice, which are the *medium* by which he administers the laws, are derived from the power of the crown. For whether created by act of parliament, letters patent, or subsisting by prescription, (the only methods by which any court of judicature can exist,) the king's consent in the two former is expressly, and in the latter impliedly given. In all these courts the king is supposed, in contemplation of law, to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious number of courts, some with a more limited, others with a more exten-

The AUTHORITY and JURISDICTION of

five jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal, and by way of review.

Courts of record.

All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment, makes it instantly a court of record. *Finch's Law.* 235. *Salk.* 200. *12 Mod.* 388. The courts of Westminster are the superior courts of the kingdom, and have a superintendency over all other courts by prohibitions, if they exceed their jurisdiction, or writs of error, and false judgments of their proceedings. *Carth.* 11, 12.

By Saxon constitution only one superior court.

By the ancient *Saxon* constitution, there was only one superior court of justice in the kingdom: and that had cognizance both of *civil* and *spiritual* causes, viz. the *wittenagemote*, or general council, which assembled annually, or oftener, wherever the king kept his *Easter*, *Christmas*, or *Whitsuntide*, as well to do private justice as to consult upon public business: but at the conquest, the ecclesiastical jurisdiction was diverted into another channel. The conqueror, fearing danger from those annual parliaments, established a constant court in his own hall, called by ancient authors *aula regia*, or *aula regis*, which was composed of the king's great officers of state resident in his palace, and attendant on his person, assisted by certain persons learned in the laws; all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business both criminal and civil, and likewise matters of the revenue; and over all presided one special magistrate, called the *chief justiciar*, or *capitalis justiciarius totius Angliæ*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length obnoxious to the people, and dangerous to the government which employed him.

Spel. Gloss. 331, 332, 333.

This

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject : wherefore *king John*, who dreaded also the power of the *justiciar*, very readily consented to that article which now forms the eleventh chapter of *magna carta*, and enacts, " That *communia placita non sequantur curiam regis, sed ite-
neantur in aliquo loco certo.*" This certain place was established in Westminster-hall, the place where the *aula regis* originally sat, when the king resided in that city, and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too ; and a chief, with other justices of the common pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject.

The court of king's bench bound to follow the king.

The *aula regia* being thus stripped of a considerable branch of its jurisdiction, and the power of the *justiciar* being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of *king Henry* the third. And in further pursuance of this example, the other several offices of the chief *justiciar* were, under *Edward* the first, (who new-modelled the whole frame of the judicial polity,) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and marshal presided ; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers ; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other, the court of *chancery* issuing all original writs under the great seal to the other courts ; the *common pleas* being allowed to determine all causes between private subjects ; the *exchequer* managing the king's revenue ; and the court of *king's bench* retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the

The *aula regia* stripped of a branch of its jurisdiction.

The AUTHORITY and JURISDICTION of

rest by way of appeal; and the sole cognizance of pleas of the crown, or criminal causes.

Court of K. B.
is the supreme
court.

The court of king's bench is the supreme court of common law in the kingdom; and is so called, because the king used formerly to sit there in person; it consists of a *chief justice* and *three puisne justices*, who are by their office the *sovereign conservators of the peace, and supreme coroners of the land*. Yet, though the king himself used to sit in this court, and still is supposed to do so, he did not, neither by law is he empowered to determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority. 4 *Inst.* 71. 73.

This court a
remnant of the
aula regia.

This court is the remnant of the *aula regia*, and is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process by original, issuing out of this court in the king's name, is returnable, "*ubicunque fuerimus in Anglia*."

Usually sat at
Westminster.

For some centuries past it hath usually sat at *Westminster*, being an ancient palace of the crown; and we find that after *Edw. I.* had conquered *Scotland*, it actually sat at *Roxburgh*. *Hal. Hist. C. L.* 200.

Termed the
custos morum of
the realm.

It is termed the *custos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequences (if not restrained), adapts a proper punishment to it. 2 *Haw. Pl. C.* 6. *Sid.* 168.

Peculiar
jurisdiction.

It has a peculiar jurisdiction, not only over all capital offences, but also over all other misdemeanors of a public nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences being manifestly against the public good, directly injure any particular person or not. 4 *Inst.* 71. 11 *Co.* 98. 2 *Haw. P. C.* 6. It has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require. 2 *Haw.* 7. Also this court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether

whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law concerning an old offence. 9 Co. 118. 2 Inst. 549. *Crompt. Jurif.* 131. But before allowance of a *certiorari*, the defendant must find sureties to appear and plead, and to procure the issue to be tried the next assizes, or next term after such *certiorari* granted, or sitting after the said term, and give due notice thereof, and appear from day to day in the said court, and not depart the same until discharged. Stat 5 W. & M. c. 11. and 8 & 9 W. 3. c. 33. And if defendant removes the indictment, he must pay costs, if convicted, to be taxed to the prosecutor within ten days after demand made, and refusal of payment on oath, otherwise an attachment to be granted. 5 & 6 W. & M. c. 11. 6 Mod. 246.

The jurisdiction of this court is so very high and transcendant, that it keeps all inferior jurisdictions within the bounds of their authority; and may either remove their proceedings to be determined here, or prohibit their progress below: it superintends all civil corporations in the kingdom: commands magistrates and others to do what their duty requires in every case, where there is no specific remedy: protects the liberty of the subject, by speedy and summary interposition: takes cognizance both of *criminal* and *civil* causes; the former in what is called the *Crown Side* or *Crown Office*; the latter in the *Plea Side* of the court. The jurisdiction of the crown side is not intended to be here treated of. But on the civil or plea side it hath an original jurisdiction and cognizance of all *actions of trespasss, or other injury alleged to be committed vi et armis: of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case*, which allege any *falsity or fraud*; all of which favour of a criminal nature, although the action is brought for a civil remedy, and makes the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party. *Finch* 198. The same doctrine is also extended to all actions on the case whatsoever (*except real actions*), and has continued to do so for ages; it being surmised that the defendant is arrested for a supposed trespasss, which he never has in reality committed; and being in the custody of the marshal of this court,

The jurisdiction

Fictions.

the plaintiff is at liberty to proceed against him for any other personal injury; which surmise the defendant is not at liberty to dispute. These fictions of law, on consideration, are highly beneficial and useful, especially as this maxim is ever invariably observed, *That no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.* 3 Rep. 30. 2 Roll. Rep. 502. Co. Litt. 150. 11 Rep. 55.

Highest court of common law.

This court, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates, and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice. 2 Haw. P. C. 8. Vaugh. 157. Salk. 201. pl. 3.

Prison.

Newgate is as much the prison of this court as the king's bench prison is: every prison in the kingdom is the prison of this court. *Rex v. Davis*, 1 Burr. 641.

Court of appeal.

It is a court of appeal, into which may be removed by writ of error, all determinations of the court of common pleas, and of all inferior courts of record in England. Yet even this court is not the dernier resort of the subject: for, if he be not satisfied with any determination here, he may remove it by writ of error into the court of exchequer chamber, if the proceedings are by bill, or into the house of lords if by original.

Grants a habeas corpus.

It grants an *habeas corpus* to relieve persons wrongfully imprisoned; and upon return of the cause, they may be bailed or discharged as the court shall think fit: Also *mandamus's* to inferior courts to oblige them to do their duty, and prohibitions to keep them within their proper jurisdiction.

The duty of the court to correct errors of inferior jurisdictions.

It is the duty of this court to correct the errors of inferior jurisdictions, and to grant a *mandamus* where it suspects on strong grounds that injustice has been done below, in cases where a *mandamus* lies. 6 Term Rep. 104. *Rex v. Chan. of Un. of Cambr.*

This court cannot hold plea for a less sum than 40s.

As the inferior courts, which are not of record, regularly cannot hold plea of debt, &c. or damages, but under 40s.; so the superior that are of record, cannot hold plea of debt, &c. or damages, regularly, unless the sum amount to 40s. or above. 2 Inst. 311. Stat. 6 Ed.

6 Ed. 1. c. 8. which enacts, "That none shall have writs of trespass before justices, unless he swear by his faith, that the goods taken away were worth 40s." For the wisdom of the common law was, that men should not be troubled for suits of small value in the king's courts, there being inferior jurisdictions established, in order to bring justice home to every man's door. 2 Inst. 311. *Ne dignitas curiarum illarum vilesceret, & ne materiam superaret opus.*

This court, in conformity to determinations in the exchequer and common pleas, will stay the proceedings in an action where the demand does not amount to 40s. on the oath of the defendant, and uncontradicted by the plaintiff; although the demand of plaintiff appears to be more than 40s. by his declaration. *Kennard v. Jones*, 4 Term Rep. 495. *M. 32 Geo. 3. Wellington v. Arters*, 5 Term Rep. 64. *M. 33 Geo. 3. S. P. vide Stean v. Holmes*, 2 Black. Rep. 754. Mr. Justice Buller in the case of *Kennard v. Jones* states, that the practice had been not to grant such rules in this court, unless the demand appeared to be under 40s. on the record. And this appears in the case of *Oulton and Perry*, 3 Burr. 1592. For the court there said, they could not try the quantum upon affidavit. The distinction is where it appears on the face of declaration, or not.

In case the debt appears, by the declaration to be for a less sum than 40s. or on the oath of defendant uncontradicted by the plaintiff, court will stay the proceeding.

If a cause has been removed from an inferior court, this court will grant a *procedendo*, if the debt or damages appear to be under 40s. *Brownl. brev. Judg.* 140. 2 *Brown.* 82. *Moyle* 69. But in an action for an assault brought against excise officers, the court refused to quash a *certiorari*, the damages being under 40s. because it appeared that defendants could not have an impartial trial in the inferior court. *Daniel v. Philips*. 4 Term Rep. 499.

So, if the cause be removed from an inferior court,

Assault against excise officers.

By stat. 43 Eliz. c. 6. it is enacted, "That if any personal action be brought in any of her majesty's courts at Westminster, (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery,) it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, shall not amount to the sum of 40s. that in every such case the judges or justices before whom

No more costs than damages if recovery amount to less than 40s.

“such action shall be pursued, shall not award the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to; but less at their discretion.”

Debt lies under 40s.

If upon a nonsuit in an inferior court, 16s. is given for costs, by 23 H. 8. c. 15. debt lies for it in this court, because given by a subsequent statute to the statute of Gloucester. *Cro. Eliz.* 96. *Leon.* 316.

Style of the court.

The style of the court is, “*Pleas before our lord the king at Westminster, of the term of Saint Hilary, in the thirty-sixth year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith—And in the year of our Lord 1796.*”

Two ways of proceeding in this court.

In this court there are two ways of proceeding, viz. by *special original writ*, or by *bill*; the former is generally used in case the debt is large, because the defendant, if he means to delay execution of the judgment, must bring his writ of error returnable in parliament, which greatly enhances the expence; but the latter is the more expeditious.

If privilege.

If the party is privileged as an attorney, or other person entitled to privilege, this court holds plea on a writ of privilege, which is the first process issued against the defendant, to compel him to appear and make his defence.

Attornies, &c.

If attornies, officers or ministers of this court, are sued by persons not entitled to privilege, they must be sued by *bill*, which expresses either the grievance or wrong which the plaintiff hath suffered by the defendant, or some fault by him committed against some law or statute of the realm.

Peers it seems might have been sued by original bill and summons.

Peers may be sued by such process out of the courts at Westminster, as they might have been out of privilege time: so *members* may be sued by summons and distress infinite or by bill original. 12 & 13. W. 3. c. 3. It seems that *peers* were by the practice of this court sued by *original bill* and *summons*, previous to the above statute which was certified in the case of *Say v. Lord Byron*, *Say Rep.* 63. M. 26 Geo. 2. on a search made for precedents on the question, whether he could be sued by *bill*? and the court said *why could it not support its antient jurisdiction as well as the court of exchequer hold plea as debtor domini regis?* And in the case of *Gosling v. Lord Weymouth*, *Cowp. Rep.* 182. the court

court confirmed the case of *Say v. Lord Byron*, and said, The original bill was the common law process. But in the case of the earl of *Lonsdale v. Littledale* in error in the house of lords, one of the errors assigned was, "that the said earl being a peer of this realm ought to have been sued by original writ, and not by bill;" with the common errors—the following questions were proposed. Whether the court of king's bench hath any jurisdiction to hold plea in a personal action against a peer of the realm, and lord of parliament, who is neither in custody of the marshal, nor is an officer or minister of that court, without the king's original writ issuing out of his chancery to warrant such action? 2. If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant by pleading to issue, and proceeding to trial in an action commenced without the king's original writ? *Eyre, C. J.* stated the opinion of the judges, that the first question would have admitted considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities on the subject. But that after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court, and the judgment was affirmed. 2 *H. Black. Rep.* 299. *E. T.* 34 *Geo.* 3. 1794. One of the reasons assigned in support of the objection was, that the bill states him to be in custody of the marshal; but that is not true, for I never saw a bill filed against a peer or member with these words, but thus: *Middlesex: A. B. complains of C. duke of B. in a plea of trespass on the case. For that whereas, &c.* and at the end of the conclusion process is prayed, according to the statute.

But in this case it stands doubtful.

Also a knight, citizen, or burghers, or other person entitled to privilege of parliament, may be sued in this court by original writ, or by original bill and summons, in manner as directed by the *Stat. 12 & 13 Will.* 3. c. 3. upon which a writ of summons and *distringas* issue to compel his appearance: But no writ of summons will lie against a person not entitled to privilege, on a bill filed against him in this court; though many have attempted that mode of proceeding, which has been set aside with costs. *Whitworth v. Richardson*, *H.* 23 *Geo.* 3. *Tidd.* 82.

Members, &c.

Actions.

IT has been already observed that, the more effectually to accomplish the redress of private injuries, courts of justice were instituted in every civilized society, in order to *protect* the *weak* from the insults of the *stronger*. The remedy therefore principally to be sought by application to these courts of justice is by *civil action*, which is the form of a suit given by law, for the recovery of that which is due to the person applying, and invented to preserve men's persons and properties from the violence and injustice of others; whereby the suitors are obliged to submit to the public measure of their damages: For were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was at first invented to prevent.

In every action that is brought, the person complaining is called the *plaintiff*; and the person who is called upon to make satisfaction, is called the *defendant*.

As all wrong may be considered as merely a privation of right, the one natural remedy for every species of wrong is the being in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c. to which damages the party injured has acquired an *incomplete*, or *inchoate right*, the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained, (which are sometimes considered in the light of the remedy itself,) are a diversity of *suits* and *actions*, which are defined by the mirror to be, "*the lawful demand of one's right*," or *jus prosequendi in judicio quod alicui debetur*.

There is a great diversity between a *writ* and an *action*; the *action* is the right of a suit, and the *writ* is grounded

Remedy for
wrongs is by
action.

Diversity be-
tween a writ and
action.

grounded thereupon, and the mean to bring the plaintiff to his right.

Actions are divided into *criminal* or *civil*. *Criminal Actions* divided, are either to have judgment of death; as appeals of death, robbery, &c. or only to have judgment of damages to the party, fine to the king, and imprisonment; as appeals of mayhem, &c.

Action is also said to be either *penal* or *popular*. The *popular* or *penal* is an action which lieth for a penalty given upon the breach of some penal statute, which every man may sue for *himself* and *the king*, or *to the poor*, or *to some public use*, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person, *qui tam pro domino rege, &c. quam pro seipso in hac parte sequitur*. If the king commences the suit, he shall have the whole forfeiture. But if any *one* hath begun a *qui tam* or *popular* action, no other person can pursue it; and the verdict passed upon the defendant in the first suit, is a bar to all others, and *conclusive* even to the king himself. 2 *Haw. P. C.* 268. and 4 *H.* 7. c. 20. enacts, *That no recovery, (otherwise than by verdict,) obtained by collusion in an action popular, shall be a bar to any other action prosecuted bona fide*. But without such penalty be given to the informer, no person can sue, for the whole goes to the king. *Ib.* 265.

The 21 *Jac.* 1. c. 4. s. 3. enacts, That no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration upon penal statutes, until the informer hath first taken oath, before some of the judges of that court, that the *offence was not committed in any other county*, than where by the said information, &c. the same is supposed to have been, and that he believes the offence was committed *within a year* before the information, &c. within the same county.

This act is held not to extend to *subsequent* statutes, as the statute of usury, 12 *Ann.* 15 *Car.* 2. *Salk.* 373, 374. 2 *Str.* 1081. *French qui tam v. Coxon.*

In a *penal action* on the stat. 25. *Ed.* 3. St. 4. c. 3. the court in a very early stage of the cause, staid the proceedings on motion, for *want of the affidavit, that the offence was committed within the county where the action was brought, or within a year before the bringing of it*, 2 *Term Rep.* 274. *White qui tam v. Boot.* But where

Penal or popular actions.

Verdict in such action.

As to affidavit before action brought.

What it does not extend to.

Penal actions court will stay proceedings.

where application was made *after verdict*, in an action for non-residence, the court refused to stay the proceedings. 3 *Term Rep.* 362. *Leigh qui tam v. Kent*.

This statute does not control any of those statutes on which penal actions are to be brought in the *superior courts*, but applies to *those only*, on which proceedings may, and ought to be had before *justices of assize*, or *nisi prius*, &c. *Ibid*.

The defendant cannot assign *the want* of the affidavit prescribed for error, *Cro. Car.* 316. *pl.* 8.; nor can it be pleaded, *Freeman* 376. 3 *Keb.* 363. *Garrett v. Baskerville*; for it is only directory to the officer.

Action at
party grieved.

There is also an action at the suit of the *party grieved*, which is given by statutes, as 13 *Ed.* 1. c. 1. and 9 *Geo.* 1. c. 22. and others, whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party is here bound, by the fundamental contract of society, to obey the directions of the legislature, and pay the forfeiture incurred as the law requires, in order to make satisfaction in damages to *all* persons who have suffered by the offences enumerated.

In real actions,
names of the
parties.

He that sues in an action *real* for title of land, is called the *demandant*, and he that is sued, is called the *tenant*.

Personal.

In every *other* action, the person complaining is called the *plaintiff*, and the person who is called upon to make satisfaction is called the *defendant*.

When court will
compel actions
to be consoli-
dated.

If *two* actions be brought by the same plaintiff at the same time, *for causes which may be joined*, and the defendant is holden to bail in *both*, the court will compel the plaintiff to consolidate them, and pay costs of the application. *Cecil v. Briggess*, 2 *Term Rep.* 639.

What actions
die with the
person.

Where a wrong is *ex maleficio*, it dies with the person; but where it is *ex contractu*, it does not. *March Rep.* 14.

In trespass, bat-
tery, &c. the ac-
tion dies with
the person.

In actions *personal*, arising *ex delicto*, for wrongs actually done or committed by the defendant; as *trespass*, *battery*, and *slander*; the rule is, that *actio personalis moritur cum persona*: and it never shall be received against the executors or administrators. 3 *Black. Com.* 302. 4 *Inst.* 315.

Civil actions di-
vided.

Civil actions are again divided into *real*, *personal*, and *mixed*. *Real*, which concern real property only, are such whereby the plaintiff, or demandant, claims title

to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life: but these actions are now generally laid aside, being very dilatory and expensive; and a more commodious method is contrived to dispute the title of lands, called an ejectment. *Co. Lit.* 284. *2 Inst.* 40.

Personal actions are—*account, assumpsit, covenant, debt, detinue, assault and battery, false imprisonment, case, and trespass.* Personal.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained; as for instance, ejectment, which entitles the plaintiff not only to restitution for the term of years, but also damages for the wrong: waste, not only to recover the land wasted, but also treble damages, which is a personal recompense; and under these three heads may every species of remedy, by suit or action, be comprized. Mixed actions

By the common law, *account* lay only against a Account. guardian in *socage, bailiff, or receiver*, or by one in favor of trade and commerce, naming himself merchant, against another, naming him merchant; and for the executors of a merchant; for between these there was such a purity, that the law presumed them consulant of each other's disbursements, receipts, and acquittances. *Co. Lit.* 172. *a.* 11 *Co.* 90. *a.* 2 *Roll. Abr.* 161. *2 Inst.* 404.

The stat. 13 *Ed.* 3. *c.* 13. gives an action to the executors of a merchant. The 25 *Ed.* 3. *st.* 5. *c.* 5. to executors of executors. The 31 *Ed.* 3. *c.* 11. to administrators; and by the statute 4 *Ann.* *c.* 16. *sec.* 27. actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors, &c. against the other, as bailiff for receiving more than his share, their executors, &c. The nature of this action is fully stated in my *Modern Pleader*, to which I beg leave to refer the practitioner, p. 143 to 147.

An *assumpsit* is an action the law gives a party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express* or *implied* by law, and gives the party damages in proportion to the loss he has sustained by the

Assumpsit
founded on con-
tract *expressed* or
implied.

the violation of the contract. 4 Co. 92. *Moor*, 667. But here it must be observed, that the law distinguishes between a *general indebitatus assumpsit*, and a *special assumpsit*; for though they come under the denomination of actions on the case, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie. 2 *Ld. Raym.* 1034. *Doug.* 1. *Walker v. Whitter*. But for a particular undertaking, or collateral promise to discharge the debt or duty of another, a *special assumpsit* must be brought. 1 *Bacon Abr.* 163.

Agreements
(except, &c.)
to have now a
7s. stamp.

Agreements, after 1 August 1783, (except where the matter of agreement shall not exceed 20l. and also except those for lease at rack rent for messuages under the yearly value of 5l. those for hire of labourers, artificers, manufacturers, or menial servants; and those relating to sale of goods, &c.) are to be stamped with a 6s. stamp by 23 Geo. 3. c. 58. s. 4. now 1s. more by 35 Geo. 3. c. 30. s. 1. No memorandum or agreement written upon an unstamped paper shall be deemed void, in case it is stamped at the head office, and the duty paid within 21 days after the same shall have been entered into. 23 Geo. 3. c. 58. s. 5.

Stat. of frauds.

Some agreements, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. 2. c. 3. enacts, That in the six following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. Where there is any agreement that is not to be performed within a year from the making thereof. 6, and lastly, That no contract for the sale of goods, &c. for 10l. or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties

Contracts for
goods of 10l. or
upwards.

parties to be charged or their agents, thereunto lawfully authorized. In all these cases a mere verbal *assumpsit* is void. The practiser will find all the cases determined under these statutes in my *Modern Pleader*, p. 163 to 171.

As men have a right to their acquisitions, so may they dispose of them at their pleasure, and without valuable consideration; but if a man promise to convey land, or to give goods without valuable consideration, or without delivering possession of them, this alters no property, nor has the party any remedy in law or equity, being *nudum pactum unde non oritur actio*. 6 Co. 18. b. Nudum pactum,

Consideration is defined a cause or occasion meritorious, that requires a mutual recompence in fact or in law. Therefore if a man promises so much money at a day to come to build a house or a church, without consideration, this is a naked promise, and will not oblige. *Doct. & Stud.* 213. *Roll. Abr.* 9, 10. Consideration, when void.

Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 *Bulstr.* 269. Void promise.

A consideration altogether executed and past, is not good to maintain an *assumpsit*; but if it were moved by a *precedent* request, it is good, and doth amount to a promise, *Roll. Abr.* 11, 12. for it is not reasonable that one man should do another a kindness, and then charge him with a recompence.

As all considerations are deemed insignificant and void, that are not of some benefit to the promisor, or loss to the promisee, so if they are *wicked* and *ill* in themselves, or *unlawful* by being prohibited by some act of parliament, they are void. *Roll. Abr.* 16. Unlawful consideration.

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. 2 *Burr.* 1008.

Implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law: which extends to all presumptive undertakings and *assumpsits*; which, though never perhaps actually made, yet constantly arise upon this general implication and intendment of the courts of judicature, that every man hath engaged to perform what Implied contracts.

what his duty or justice requires. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit*, on a *quantum meruit*. There is also an *implied assumpsit*, or a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Implied assumpsit.

Another species of implied assumpsit. Money had and received.

Another species of *implied assumpsit* is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies, that the person so receiving *promised and undertook to account for it to the true proprietor*. And if he *unjustly detains it*, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which *ex æquo et bono* he ought to refund. 2 Burr. 1012. *Moses v. Macfarlan*.

If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives an action for money had and received, founded on the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*) as the Roman law expresses it. 2 Burr. 1008. S. C.

The

The nature of this action is fully treated of, and the several cases determined are stated in my *Modern Pleader*, p. 172 to 187.

Covenants, contracts, and agreements are often used as synonymous words, signifying an engagement entered into, by which one person lays himself under an obligation to do something beneficial to, or to abstain from an act, which, if done, might be prejudicial to another. Covenants,

As the good of society requires a punctual performance of, and that no person should be allowed to rescind and break through his contracts, so the law has provided a remedy by action of covenant, in which the injured party is to recover damages for the violation of the contract, in proportion to the loss he has sustained.

Covenant lies where a man covenants with another, by deed, to do something, and does it not. *Fitz. N. B.* 145. Covenant, when lies. And it lies upon a covenant in any deed indented, or poll. *1 Roll.* 517. *l.* 40.

Covenant lies for the recovery of damages upon contracts by deed, as upon articles of agreement, charter parties of affreightment, indentures of apprenticeship, leases, mortgages, &c.

But does not lie upon an agreement without deed; but an action on the case. *F. N. B.* 145. When not.

It lies not on a lease made by the committee of a lunatick, for he cannot make a lease at law. *Knipe v. Palmer*, 2 *Wils.* 130. Lunatick.

If a man covenants with *B.* to do a personal thing, and dies, his executor or administrator shall have covenant upon it. *F. N. B.* 145. By an executor.

So where the covenant relates to the inheritance, the heir may have an action upon it. *1 Roll.* 520. *l.* 42. Heir.

So by the common law, upon a covenant in law, the assignee of the estate shall have an action. *Dy.* 257. *5 Co.* 17. *a.* *Mo.* 419. *4 Co.* 80. *b.* Assignee.

If a man covenants with *B.* and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant. *1 Roll.* 519. *l.* 35. *40.* *Cro. Eliz.* 553. So in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. *2 Mod.* 269. *1 Roll.* 519. *l.* 33. So if he covenants for him and his assigns: for an executor or administrator is an assignee. *Mo.* 44. Against executors.

- But it does not lie if a covenant be for a personal act of the testator, if the breach be not in his lifetime.
- Against heirs. If he covenants for him and his heirs, covenant lies against the heir. *Lut.* 287.
- When assignee liable. If a man covenants to do a thing, which has existence at the time of the demise, and relates to it; the covenant runs with the land, and binds the assignee, though he be not named: as, if he covenants to pay the rent reserved, to repair the house demised. *5 Co.* 16. *b.* 24. *b.* *Cro. Eliz.* 457. 552. *1 Roll.* 521. *l.* 37.
- Lessee of tithes. Covenant from lessee of tithes for himself or assigns, not to let the farmers have the tithes, runs with the tithes and binds the assignee. *Bally v. Wells*, 3 *Wilf.* 25.
- When assignee not liable. If lessee covenants to pull down old houses, and build new on the ground in seven years, and does not, but after seven years assigns; assignee is not liable, for the covenant does not run with the land. *St. Saviour's v. Smith*, 3 *Burr.* 1271. For it was broken before the assignment. *1 Salk.* 199.
- Debt, in what cases it lies. Debt lies for the recovery of a *sum certain* upon acts of parliament, judgments within or after the year after recovery, statutes, recognizances, specialties, and simple contracts, *express* or *implied*.
- Also lies in *C. B.* upon a judgment on *scire facias* upon a recognizance in *B. R.* *Dy.* 306. *a.* in *marg.*
- So in *B. R.* upon a judgment in *C. B.* removed thither by error. *1 Sid.* 236.
- So it lies there upon a judgment there after error brought in the exchequer. *1 Sid.* 236. *Lut.* 602. *1 Lev.* 153. *Ray.* 100. Or after error depending in parliament; for only the transcript of the record is removed. *1 Sid.* 236.
- But does not lie after *elegit* or *ca. sa.* had. But it does not lie on a judgment after execution sued by *elegit*, or otherwise, for the plaintiff hath chosen another remedy. *1 Roll.* 601. Nor after defendant is taken on *ca. sa.* and discharged by plaintiff's consent. *4 Burr.* 2482. *Vigers v. Aldrich*.
- Against sheriff. It lies against a sheriff for money levied by him upon a *feri facias*; for the law creates a contract for his paying; *1 Roll.* 598. *l.* 10. though the writ be not returned. *Ibid.* *l.* 15.
- Foreign judgment. Debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. If he conclude *prout patet per recordum*, that is to be rejected

as surplufage, and the defendant cannot plead *null tiel record*. Dougl. 1. *Walker v. Whitter*. Wherever *indebitatus assumpsit* can be maintained, debt will lie. *Ibid*.

It lies for a penalty given by an act of parliament, for the penalty of a bye-law; though it is not said by what action it shall be recovered. 1 *Roll*. 599. l. 25. So for a *nomine pœnæ*. 1 *Lev*. 110. For a pain or amercement in the court baron. 2 *Saund*. 66. 1 *Lev*. 203. So for a fine upon an admittance to a copyhold. 1 *Sid*. 58. 2 *Mod*. 230. 3 *Mod*. 340. *Hard*. 487. So for fees given by a statute to a sheriff. *Mo*. 853. 1 *Salk*. 209.

Penalty by act of parliament or bye-law.

But it does not lie on a bill of exchange against the acceptor. *Hard*. 485. Nor on a promissory note. *Str*. 680.

But not on a bill of exchange or note.

In debt for goods sold and delivered, the plaintiff declared that the defendant at Westminster, in the county of Middlesex, was indebted to him in a certain sum for goods sold and delivered, without alledging an *express contract* and *place* where such contract was made; upon special demurrer for these causes, the court held the *contract* and *venue* well laid. *Emery v. Fell*, *Trin*. 27 *Geo*. 3. *B. R.*

For goods sold, how to declare.

It is determined that the plaintiff may recover a less sum than demanded, provided he remits on the roll the residue. 1 *Lord Ray*. 816.

May recover less than the demand.

In a declaration in debt on *simple contract*, although it *specified* by the several counts a *less* sum than *demand- ed*, it was held good. *McQuillin v. Cox*, 1 *H. Black*. *Rep*. 249.

It is said in *Seaman v. Dee*, 1 *Vent*. 198. that no action of debt lies for the interest of money; but it is to be recovered by *assumpsit* in damages. In the case of *Herries v. Jamieson*, the second count was debt for 66 l. for *legal interest* for *money lent*; Lord *Kenyon* and the court seemed to be of a different opinion. 5 *Term Rep*. 553.

Penalty merely a security.

This court permitted the *penalty* of a bond to indemnify a parish against the expence of a bastard child, to be paid into court, notwithstanding the case of *Lord Lonsdale and others v. Church*, 2 *Term Rep*. 389. *Wilde v. Clarkson*, 6 *Term Rep*. 503. which agrees with the opinion of *De Grey, C. J.* in *Branguin and Perrott*, 2 *Black. Rep*. 1190. and *White v. Sealey*, Dougl. 48.

Bond of indemnity.

where *Lord Mansfield* says, As the bond is conceived, are the defendants liable *for more than the penalty*? I think not, upon the true construction of the statute of William, the meaning of which only was, that a plaintiff should not, upon every breach, be obliged to go into a court of equity to have issues directed of *quantam damnificatus*: and *Buller, J.* was of the same opinion; but in *Lord Lonsdale v. Church*, he is stated as not satisfied with that determination.

Affault.

Affault lies where there is an attempt or offer to beat another without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes at him, but misses him. *Finch. 202.* Battery is the unlawful beating of another. The least touching of another person *wilfully* or in *anger*, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. 6 *Mod. 173.* 149. *Vent. 256.*

If the plaintiff declares for an assault and battery, he may recover for the assault only, though the declaration cannot be singly for the assault. *Kitch. 38. a.*

Costs.

If the plaintiff recovers a less sum than 40s. there are no more costs than damages, 22 & 23 *Car. 2. s. 149.* unless the judge certifies the battery proved. 1 *Term Rep. 655.* 11 *Mod. 198.*

Judgment by default costs of course.

But if he lets judgment go by default, or justifies the assault and battery, less damages will recover the costs. *Bull. 329. Salk. 665.* If he justifies the *assault only*, or the *assault only* is certified, if he recover less than 40s. he shall have no more costs than damages. 3 *Term Rep. 391.* 2 *Lew. 102.*

Imprisonment.

Affault and false imprisonment. This action lies for every confinement of the person without sufficient authority, and is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault. 2 *Inst. 598.* And to constitute the injury, there are two points requisite: 1. *The detention of the person*; and, 2. *The unlawfulness of such detention.* *Ibid. 46.*

Case.

Case. This action lies in a great variety of instances, viz. For affecting a man's reputation or good name, by malicious, scandalous, and slanderous words, tend-

ing

ing to his damage and derogation^a. On an *assumpsit* ^a Hob. 138. or undertaking, where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution; as by selling him bad provisions or wines^b, by the exercise of a noisome trade which ^b Roll. Abridg. 95. infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary^c. For it hath been solemnly resolved that ^c 11 Hen. 6. 18. *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Against carriers and others upon the custom of *England*^d; innkeeper for goods stolen in his house while he is a guest^e. For deceits in contracts, bargains, and sales^f; for negligence; keeping a dog accustomed to bite sheep^g; taking or enticing away my servant or apprentice, whereby I lose his service^h; disturbance in the use of a seat in the churchⁱ; for injuries done in commons^k; for malicious prosecutions, conspiracy, escape, and rescous; for stopping up a water-course or way; breaking down a party wall; stopping of ancient lights, and for any private nuisance to a man's walls, light, or air^m; against sheriffs for default in executing writsⁿ; for disturbing a parson in taking his tithes, &c. 2 *Cro.* 478.

Trover is a special action on the case, which one man hath against another, who hath in his possession any of his goods by delivery, finding, or otherwise; and sells or makes use of them without his consent, or refuses to deliver them on demand; and it is to recover damages to the value of the goods. 2 *Lill. Abr.* 618. It lies for goods tortiously seized by officers of the revenue. 3 *Atk.* 146. 5 *Burr.* 2657. *Tinkler v. Poole*.

So if a party pay money to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer. 6 *Term Rep.* 298. *Shipwick v. Blanchard*.

In order to maintain trover, the goods must be taken or detained with intent to convert them to the taker's own use, or the use of those for whom he is acting. There must be a taking in fact, and an exclusive possession, in order to maintain trover, though there need not be a manual taking of the whole property. Vide 6 *Mod.*

215.

What will maintain trover.

Executors may have this action for a conversion of goods *in the life* of their testator. *Cro. Eliz.* 377.

The *conversion* is the *gift* of the *action*, 3 *Salk.* 366. for which a *certain time* and *place* must be alledged. *Mod. Caf. L. & Eq.* 177.

This action in *form* is a *fiction*, in *substance* a *remedy*, to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully.

If the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it.

It is an action of *tort*: and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to intitle the plaintiff to recover; first, *property* in the plaintiff; and, secondly, a wrongful *conversion* by the defendant.

As to demand
and refusal.

Where an *actual taking of the goods in question* is given in evidence, that is sufficient without shewing a *demand* and *refusal*, for it is an *actual conversion*; but when the defendant comes to the goods by *finding*, *delivery*, or *bailment*, there an *actual demand* and *refusal* must be shewn, in order to establish a conversion, unless an *actual conversion* can be proved; in which case, it is *not* necessary to prove a demand, proof of the *conversion* being sufficient. *Bruen v. Roe*, *Sid.* 264. *Clay.* 1.2. *Esp.* 589. *Lill. Pract. Reg.* 759. Such demand must be *before* action.

If a man finds my goods, (knowing them to be mine,) and refuses to deliver them to me *upon demand*: this is a conversion, for the *denial* makes him a trespasser *ab initio*. *Danv.* 21.

Evidence of
conversion.

In general, *demand* and *refusal* is sufficient evidence of a conversion. *Cro. Eliz.* 495.

Where the defendant takes the goods wrongfully and by trespass, the plaintiff, if he thinks fit to bring *this* action, waves the trespass, and admits the possession to have been lawfully gotten. *Cooper and others v. Chitty*, 1 *Burr.* 31.

May be brought
against a sheriff.

It is maintainable by the assignees against a sheriff who sells the goods of a bankrupt (before taken by him

him in execution) after assignment: for, after assignment, they become *the property of the assignees from the time of the bankruptcy, by relation.* *Ibid.* 31, 32.

It lies against the sheriff for this unlawful *conversion*, though this relation shall *not* make him a *trespasser* or *wrongdoer*, where the *original taking* of the goods was prior to the assignment, and lawful. *Ibid.* 35 to 38.

The declaration ought to shew *the property* in the plaintiff, yet if it says that the plaintiff was *possessed*, omitting *ut de bonis suis propriis*, it is good. *Mo.* 691.

Hardr. 111. If it says that the testator was possessed, and made the plaintiff executor; it is sufficient, without saying, *that he was possessed.* *Lat.* 214. 2 *Cro.* 129. So the declaration must *express the goods demanded with convenient certainty*; but it is sufficient if there be *certainty enough to describe the thing to common understanding.* *Sho.* 144. It ought to alledge a *conversion*, as also the *time and place of the conversion*: for it is traversable. *Cro. Eliz.* 97, 8, 78. 1 *Brownl.* 8. The conversion was laid before the trover. Court held *postea convertit* sufficient, and the *scilicet* such a day is void. *Cro. Jac.* 428. The defendant may plead not guilty or a release. *Plea.* Not guilty *infra sex annos.* *Lut.* 99. He cannot justify detaining goods till money laid out on them is paid. But it may be deducted in the damages. *Str.* 657.

The declaration was general, as of *Michaelmas Term*, and the *conversion* was laid on a *day certain* in *that term*, and held good. 3 *Salk.* 9. *Sawen v. Hulbert.*

Detinue lies for the recovery of goods in *specie*, and also damages for the detainer; and it lies against a person who has them either by delivery or finding. But as the defendant in this action may wage his law, *trover* is the action in more common use.

It lies for money or goods so certainly described that they may be known: As for money in a chest or bag. 1 *Roll.* 606. l. 12. 14. For particular pieces of silver. *Ibid.* l. 25. So for an obligation deed, &c. *Reg.* 159. b. So for a note, bill, &c. The declaration must contain *more certainty* than is necessary in trover. *2 Danv.* 520.

The plaintiff must prove an actual possession in the defendant, and the detainer of the goods precisely as mentioned in the declaration: and therefore if *detinue*

be brought for a bond, and it is proved to be for a greater or less sum, it is not sufficient. 2 R. A. 703.

Trespass.

Trespass lies for an injury done by one private man to another; as entering on another man's ground without a lawful authority, and doing some damage however inconsiderable to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; and every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The party must have property in the soil, and actual possession by entry, to be able to maintain it; or, at least, it is requisite that the party have a lease and possession of the vesture and turbage of the land. Moor. 456. 1 Inst. 57. 2 Roll. Abr. 572. 2 Lill. Abr. 596. 2 Roll. Abr. 545.

Must have the the actual possession, or constructive possession.

To entitle a man to bring trespass, he must at the time when the act was done, which constitutes the trespass, either have the actual possession in him of the thing, which is the object of the trespass, or else he must have the constructive possession in respect of the right being actually vested in him. *Smith v. Miles*, 1 Term Rep. 480. *Aspburst, J.*

Personal property.

The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although he has never been in the actual possession of it: For a general property does always draw to it a possession in law; which possession is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found an action of trespass upon. *Bro. Tresf.* 303. pl. 346. *Latch.* 214. 2 *Bulstr.* 268.

Real property.

Only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass for the injury: because the gift of an action of trespass for an injury to either real or personal property, is the being disturbed in the possession of the property. And the having a general property, does not in the case of real property, as it does in the case of personal, draw to it a possession in fact. *Bro. Tr.* pl. 38. pl. 303. pl. 346. 3 *Lev.* 209. *Latch.* 263. 2 *Bulstr.* 268. And there must not only be a possession of real property, to which an injury has been

been done; but it must be a lawful one. For an intruder into land, does not gain by the intrusion such a possession as will enable him to maintain an action for a trespass thereupon committed. 2 *Lev.* 147. *Plowd.* 546. 4 *Leon.* 184.

Trespass will not lie in this country for entering a house in *Canada* and expelling plaintiff. This court may try actions which are in their nature *transitory*, though arising out of a transaction abroad, but not such as in their nature local. *Doulson v. Mathews*, 4 *Term Rep.* 503. In Canada.

Every one of the parties to a trespass is liable to an action; for there can be no accessory to a trespass. 1 *Lev.* 124. *Bro.* title *Tresp.* 113.

An action it is said does not lie before a cause of action accrued, but if the cause of action *accrued before the bill filed* it is good, though the writ issued before. *Cowper's Rep.* 454. This was an action of trespass; and the lat. sued 22d *August* 1775; trespass proved 25th *Sept.* following. The court held, that the bill was the commencement of the suit, and the latitat was to be considered but as a process. If cause of action accrued before bill filed, good.

The law does not allow one action upon several and distinct causes of action.

In personal actions, if two causes of action are of the same nature, they may be put in one action. *Th. D.* l. 8. c. 26. s. 1, 2. When actions may be joined.

Where an *act* is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*: but where there is *no act done*, but only a culpable omission, or where the act is not *immediately injurious*, but only by *consequence* and *collaterally*, there no action of trespass *vi et armis* will lie, but an action on the *special case* for the damages *consequent* on such omission or act. *11 Mod.* 180. *Ld. Ray.* 1402. *Str.* 635. When case, when trespass.

It is of importance that the boundaries between the *differant actions* should be preserved; for if in an action of trespass, the plaintiff recover *less* than 40s. he is intitled to no more costs than damages; whereas a verdict with *nominal* damages only in an *action on the case*, carries all the costs. 6 *Term Rep.* 125. *Savignac v. Roome.*

If an action is brought on a judgment of *non pros*, which is *irregular*, the whole of the proceedings may be If an action brought on an irregular non-pros.

When actions
may be joined.

be set aside in one rule. 4 *Term Rep.* 688. *Barlow v. Kays.* Vide title *Nonpros.*

Whenever the same process and judgment are in two counts they may be joined, otherwise they cannot. 2 *Wils.* 321. Debt on a judgment and a *mutuatus* may be joined; so may debt on a *bond* and a *mutuatus*, although there be different pleas required, because there is the same process and judgment. 1 *Wils.* 248. Debt and detinue may be joined. *Bro. pl.* 97. *Gilb. C. P.* 5. Debt upon an amercement and a *mutuatus* may be joined. 1 *Wils.* 248. The *Duke of Bedford v. Alcock.* Case for a misfeasance and negligence against a common carrier, may be joined with trover. *Dickson v. Clifton*, 2 *Wils.* 319. In actions upon *contracts*, the plaintiff may join in the same writ, different causes of action in *assumpsit*.

In actions for *wrongs* he may join different causes of action in trespass, or in case; but he cannot join *trespass with case*, nor either of them with any species of *contract*. *Ibid.* Vide my *Mod. Pl.* 54. And when divers persons may join in actions, 52.

For whom and against whom an Action will lie.

AS the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their *crimes*, or their *country*; as men attainted of treason or felony, persons outlawed or excommunicated, convict in *præmunire*, alien enemies professed in orders of the papal religion, as friars, monks, &c. (unless they have attained a pardon), infants, *feme covert*s (unless by special custom), or persons not in *rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate. 1 *Inst.* 128. This is fully explained in my *Mod. Plead.* 46 to 52. In life, liberty, and estate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrongdoer. *Vaug.* 337.

Care must be
taken how
actions are
brought.

But care must be taken how such actions are brought; as if an infant is plaintiff, he must sue by his
next

next friend or guardian (*Roll. Abr.* 287.), unless he sue with others as executor, and then he may sue by attorney, for all of them together represent the testator. *Ibid.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed. 2 *Inst.* 26. If an infant recovers by *verdict*, or *judgment goes by default*, where he is plaintiff, it cannot be assigned for error, *that he is an infant*; but the defendant should have *summoned* to stay the proceedings until a guardian was appointed. Vide 21 *Jac.* 1. c. 13. 4 *Ann.* c. 16. If an idiot sue or be sued, he must do it in person. *Co. Lit.* 135. b. A married woman must sue with her husband, and in all cases where they are both sued (although the husband may answer alone,) yet the wife shall never be forced to answer without her husband (except it be a sole merchant, *i. e.* when she carries on a sole and separate trade, which is by the custom of *London* only). 10 *Mod.* 6. 1 *Inst.* 135. But she cannot sue as a sole trader without her husband in the superior courts. 4 *Term Rep.* 361. *Caudell v. Shaw*. Wherever the suit will survive to the wife, she must join in the action. 1 *Wilf.* 224. *Dunstan v. Burwell*. Or where the debt is due to the *feme dum sola*, both must join. *Moor*, 422. If baron is possessed of tithes in right of the *feme*, they must join in debt for not setting them forth, because the *feme* is the proprietor. *Cro. Eliz.* 608. 613. If the action is brought *for the labour of the wife only*, she may join in the action. 2 *Sid.* 128. *Cro. Jac.* 77. But declaration must state it to be done by the wife. 2 *Wilf.* 424. *Cro. Jac.* 77. The dippers at Tunbridge Wells all joined with their husbands, and held well. 2 *Wilf.* 414. *Weller & ux. and others, v. Baker*. If a bond be given to *baron and feme* administratrix, the husband *alone* may bring the action, and declare on it as on a *bond made to himself*. 4 *Term Rep.* 616. *Ankerstein v. Clarke*.

Married woman.

It hath been holden, that a *feme covert* may now be sued as a *feme sole*, if she has a *separate* maintenance by deed. *Corbett v. Poelnitz*, 1 *Term Rep.* 5. *Stedman v. Gouch*, *Esp. N. P.* 7. *Gilchrist v. Brown*, 4 *Term Rep.* 776. And in the case of *Eliab v. Legh*, *Mr. Just. Ashurst* said, In order to make a *feme covert* answerable for her debts as a *feme sole*, she ought to have a *permanent fund*, out of which she can satisfy her creditors.

When may be
sued as sole.

creditors. 5 *Term Rep.* 682. If her husband be transported, I take it she is liable as a *feme sole* for her debts contracted *after conviction*.

Executors.

Executors, when they bring an action, must *all* be named, although probate be granted to *one* only. 9 *Co.* 27. 1 *Sid.* 449. But when an action is brought against them, it must be only against such of them as do administer. 1 *Roll. Abr.* 924. *Carth.* 124. If there be two executors, one under age, and the other proves the will, and hath administration *durante minore*, &c. he may sue solely. But where both are of full age, though the will be proved by one only, the action must be brought in *both* their names. 2 *Lev.* 240. *Colborne v. Wright.* 2 *Jon.* 119. *Raym.* 198.

Joint-tenants.

Also, if two men have lands and goods together in joint-tenancy, and be wronged in them, they must sue jointly. *Co. Lit.* 180. Tenants in common ought

Tenants in common.

to join in actions personal, but not real; and in assize and slander of title, they ought to sever. Divers persons may have an action of trespass jointly for goods taken or the like; but of battery, or such personal trespass, the action ought to be single: if one trespass be done by divers, the plaintiff may make it joint, or several, as he pleases; and yet two that join in a trespass, do so make one trespasser, that one of them is answerable for the other; and if they be sued in one action, they may sever in pleas and issues, and a release to one is a release to all. *Hob.* 66. Also the jury must assess damages for all, but there shall be but one satisfaction; and where a joint action doth lie against several persons, and some of their names are known, and some are not, the action may be brought against them that are known by their particular names; and you may declare against them *simul cum aliis*, &c. *Comb.* 260.

Release.

Who may be sued.

Until the time of *Ed. 1.* the king might have been sued in all actions, as a common person. 22 *Ed.* 3. 3. *Th. D. l. 4. c. 1. f. 3.* But now none can have an action against the king; but one shall be put to him to sue by petition. The queen may be sued without the king her husband in all actions, for she is a person sole by the common law. *Th. D. l. 4. c. 2. f. 2.* So the queen dowager without suing to her by petition. *Ibid. f. 3.* So the prince of Wales may be sued by writ. *Ibid. f. 4.* Every subject of the king, ecclesiastical

The queen.

tical or temporal, man or woman, villian or free. 2 *Inst.* 55, 6. Though he be deaf, dumb, or an idiot. *Th. D. l. 4. c. 2. f. 4.* Though he be *non compos mentis*, lunatic. *Ibid.* Though he be committed or attainted. *Ibid. Noy, 1.* But though a person attainted is liable to civil suits, yet he ought not to be charged but by leave of the court, or of a judge at his chambers. *Foster, Cr. L. 61. 1 Wilson, 217.* Nor can he be charged with a civil action without leave, if he is in prison for a crime, as for felony, &c. without a judge's order; although he be not attainted. Though he be outlawed, excommunicated, or within age. 2 *Inst.* 56. So every body politic may be sued, or an alien born.

Persons attainted not to be charged with an action without leave of a judge.

Within what time Actions are to be brought.

THE limitation of suits is founded in public convenience; and attended with so much utility, that courts of equity adopt the statutes made for that purpose, as a positive rule; and apply it by parity of reason, to cases not within it. 2 *Burr.* 961. *Johnson v. Smith.*

Limitation of suits.

By the 32 *H. 8. c. 2.* "No person shall have a writ of right of the possession of his ancestor, but within sixty years, nor of his own, but within thirty years before the teste of the original."

Writs of right.

In all actions which are of the nature of a writ of right, in which the demandant must count of a seisin, and recover any hereditament, he shall be barred, if his ancestor had not seisin within sixty years. *Bro. Abr. on Stat. Lim.* 16. 33.

All *formedons* in reverter or remainder shall be sued in fifty years after title or cause of action fallen, and not after. 32 *H. 8. c. 2.*

And by stat. 21 *Jac. 1.* "All *formedons* in descender, remainder, or reverter, shall be sued within twenty years next after the title or cause of action first descended or fallen, with a proviso that if the person entitled to such writ be at the time of the said right first descended or fallen, within twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, then such person and his heirs may, not-

Writs of formedon within 20 years.

“ withstanding the said twenty years be expired, bring
 “ his action, or make his entry as he might have done
 “ before this act; so as such person or his heirs shall,
 “ within *ten years* next after his full age, discovery,
 “ &c. take benefit of, and sue forth the same; and at
 “ no time after the said *ten years*.”

Ejectments

An ejectment must be brought within 20 years.
Sid. 432. *Bull.* 102.

If a fine.

In case of a *fine* there must be an actual entry *within five years*; and that the confession of an entry to deliver a lease in ejectment, shall not operate to avoid a fine. 2 *Str.* 1086. *Hil.* 2 *Ann.* by all the judges (except one), *Berrington v. Parkhurst*.

No person to make entry into lands but within 20 years next after title of entry.

No person shall make entry into any lands, &c. but in 20 years next after his title of entry, which shall first accrue to the same; and in default thereof, such person so not entering, and his heirs, shall be disabled utterly from such entry. 21 *Jac.* 1. c. 16.

In ejectment for mines, plaintiff proving himself lord of the manor, and in possession of it, does not avoid the statute of limitations, if defendant has been in possession of the mines 20 years; for they are distinct possessions, and may be different inheritances. *Rich v. Johnson*, 2 *Str.* 1142.

No entry or claim, &c. unless action prosecuted.

And by the stat. 4 *Ann.* c. 16. No entry or claim shall be sufficient, unless an action be prosecuted within a year after. And it must be made upon the land, unless prevented by a special cause. 1 *Salk.* 285. *Mod. Caf.* 44.

Joint-tenant.

A *joint tenant* is not barred by *non entry* in 20 years, if his companion was in possession. *Ibid.* Nor one parcener who has the whole of the devise, where the other parcener takes the profits. *Salk.* 423.

No fine or recovery to be reversed, unless error be brought in 20 years.

No *fine*, *common recovery*, or *judgment*, in action real or personal, shall be reversed for any error or defect; unless error be commenced and prosecuted with effect within 20 years after such fine levied, recovery suffered, or judgment signed or entered upon record. 4 *Ann.* c. 16.

Reversioner cannot have error.

A reversioner cannot have error after 20 years, though his title did not accrue till after the expiration of them; and though error is brought in less than 20 years after the commencement of his title. *Loyd v. Vaughan*, 2 *Str.* 1257.

By

By 31 Eliz. c. 5. "All actions, &c. brought for Penal statutes.
 "any forfeitures on any penal statute made, whereby
 "the forfeiture is limited to the queen, shall be
 "brought within *two years*; and all actions upon any
 "penal statute, the benefit whereof is limited to the
 "king and to the prosecutor, shall be brought within
 "one year; and in default of such pursuit, then to be
 "brought for the queen within *two years* after that
 "year ended. And if any suit shall be brought after
 "the time in that behalf before limited (except on the
 "statute of tillage), the same shall be void and of
 "none effect."

A *latitat* is a good commencement of a penal action. *Bridges qui tam v. Knapton*, H. 22 Geo. 2. and the true time of taking out the writ may be shewn notwithstanding the *teste*.

By 21 Jac. I. c. 16. "Actions for words shall be Words;
 "commenced and sued within *two years* next after the
 "words spoken, &c."

N. B. This doth not extend to *scandalum magnatum*, Doth not extend
 nor to cases where the special damage is the gift of the to scand. mag.
 action; but where the words of themselves are action-
 able, special damage will not take them out of the
 statute. 1 Sid. 95. *Saunders*, 61.

§ 3. "All actions of trespass, of assault, battery, Trespass, assault,
 "wounding, imprisonment, or any of them, shall be &c.
 "commenced within *four years* next after the cause
 "of such actions or suits."

If trespass be brought for beating a servant, *per quod servitium amisit*, this is not such an action as is within the statute, being founded on the special damage. *Salk.* 206. So for *crim. con.* The plea is *not guilty within six years*. 2 Burr. 753. *Cooke v. Sayer*.

"All actions of trespass, *quare clausum fregit*, ac- Trespass quare
 "tions of trespass, *detinue*, *trover*^a, and replevin, for claus. freg.
 "taking away of goods and chattels; actions of ac-
 "count (other than such accounts as concern the
 "trade of merchandise between merchant and mer-
 "chant, their factors and servants)^b; actions on the

^a 3 Cro. 246. 333.

^b The exception as to merchants accounts is only meant to prevent dividing a running account, but extends not to accounts closed and concluded. 2 Vez. 400. *Wilsford v. Liddale*.

It does not extend to accounts current between merchant and merchant. 1 Lev. 287. 2 Mod. 312. Vide 1 Vent. 90. 1 Sid. 455.

What the exception extends to. Not to accounts current.

"case

" case (except slander); actions of debt, grounded upon
 " any lending or contract without specialty, debt for
 " arrearages of rent, are to be brought within six years
 " next after the cause of action." Ibid.

Action by an in-
 fant, &c.

No person entitled to *trespass, detinue, trover, replevin, account, debt, trespass for assault, menace, battery, wounding, or imprisonment, or action on the case for words*, shall be disabled from such actions by being at the time of such cause of action accrued, *under age, covert, non compos, in prison, or beyond seas*, so as they take the same within the times by the said statute limited after coming of age, being *discover, of sane memory, at large, or returned from beyond seas*. 21 Jac. 1. c. 16.

Seamen.

Nor by stat. 4 Ann. c. 16. Any person entitled to suit for seamen's wages, &c.

Ireland.

And if the plaintiff was in *Ireland*, that shall be *ultra mare* within this statute. Sho. 91.

So all actions on the case are within the benefit of this proviso. 2 Saund. 120. 2 Mod. 72.

They are at liberty by the statutes to bring the action within the same time after return, &c. as was limited for such action.

Or brought with-
 in a year after
 judgment or out-
 lawry reversed.

By stat. 21 Jac. 1. c. 16. If judgment for the plaintiff be reversed, or arrested after verdict, and the defendant therein be outlawed, and shall after reverse the outlawry, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action *within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed*, and not after. § 4.

If plaintiff dies,
 executor's right
 of action.

So if an action was commenced within six years, and the plaintiff dies, his executors, &c. may commence a new action, though six years are past, and shew the special matter. Salk. 425. Fitzgib. 171.

Probate.

If the grant of a probate or administration be delayed, it must be shewn. Fitz. 170. 289.

Acknowledg-
 ment of debt.

If a man after six years acknowledges the debt, and promises payment, or publishes that his debts will be paid, it will be out of the statute. Pr. Chan. 386.

What actions are
 not within the
 statute.

Debt on 2 Edw. 6. for tithes, on an award, for a fine of a copyholder, rent on an indenture of lease, or for an escape, are not within the stat. 1 Sid. 305. 1 Saund. 33. 37. 1 Lev. 273. Nor can it be pleaded by any sheriff to an action brought against him for money levied on a *fieri facias*, because the action is founded

founded in *maleficio*, as also upon the judgment on which the *feri facias* issued, which is a matter of record. 1 *Mod.* 205. 212. A charity is not barred by length of time, 2 *Vern.* 399. A legacy is not within the statute, 1 *Vern.* 256. nor a mortgage. 1 *Chan. Cas.* 102.

If the plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run; so that if he, or (if he dies abroad) his executor or administrator, do not sue within six years, they are barred by the statute. *Smith, Exec. v. Hill, Executor*, 1 *Wilf.* 135.

When the time begins to run.

If the plaintiff is a foreigner and does not come to *England* in 50 years, he still hath six years after his coming into *England*, to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Strithorst v. Groome*, 3 *Wilf.* 145. While any of the disabilities mentioned in the statute of limitations continue, the party may, but is not obliged to commence his action; the statute doth not run while any of those disabilities continue.

The statute never begins to run against a plaintiff who is a foreigner, until he comes into this realm.

If one of the plaintiffs be abroad, and the others in *England*, the action must be brought within six years after the cause of action arises. *Perry et al. v. Jackson et al.* 4 *Term Rep.* 516.

If one abroad only.

By 3 & 4 *Ann. c. 9.* Actions on promissory notes shall be brought within the time appointed for actions upon the case. And, by c. 16. all suits in the admiralty for seamen's wages shall be commenced within six years after the cause of action.

Actions on prom. notes.

In the case of justices of peace, or constables, acting under their warrants, the stat. 24 *Geo. 2. c. 24.* enacts, "That actions against them shall be commenced within six calendar months after the offence committed, or the plaintiff shall be barred." For proceeding against them, *vide* title *Justices and Constables.*

Justices of peace, or constables, action within 6 calendar months.

An acknowledgment of the debt, after the commencement of the action, takes it out of the statute of limitations. *Sir W. Yea v. Fouraker, per Cur.* 2 *Burr.* 1099.

Acknowledgment of the debt.

When an action is limited by a statute to be commenced within a certain time, a bill of *Middlesex*, or *latitat*, sued out within that time, may be produced in evidence at the trial, to prove that the action was

Commencement of the action.

D

commenced

WITHIN *what time* ACTIONS, &c.

commenced in due time. But if the writ was *not* sued out till *after* the year, though by relation it would be *within* the time, the plaintiff ought to be nonsuited. *Bull. Nisi Prius*, 135. 3 *Burr.* 1243.

The plaintiff may shew the *true* commencement of an action, contrary to the fiction, even in penal *actions*: and if there be *no* special memorandum, he may shew *by the writ*, that the action was commenced *after* the time to which the bill relates. *Morris v. Pugh*, 3 *Burr.* 1241.

Informations.

Court resolved in future to limit their own discretion in granting applications for informations in the nature of a *quo warranto* to *six years*, beyond which time they would not under any circumstances suffer a party who had been so long in possession of his franchise to be disturbed. *The King v. Dickinson*, 4 *Term Rep.* 284.

Proceedings in this Court.

Original writ.

THERE are two ways to proceed in this court, the one by *special original*, the other by *bill*; if the debt be large, and the plaintiff has cause to think the defendant will bring a writ of error after judgment, the best method is to bring the action by *original writ*, because the defendant will thereby be precluded from bringing a writ of error (except in parliament). This *writ* issues out of the court of chancery, and is a mandatory letter from the king, under the great seal, and directed to the *sheriff* of the county wherein the *injury* is supposed to be, requiring him to command the defendant either to do justice to the complainant, or else to appear in court, and answer the accusation against him; whatever the *sheriff* does, he must certify to the court, together with the writ itself.

Either optional or peremptory.

These writs are either *optional* or *peremptory*; or, in the language of the law, they are either a *præcipe*, or a *si te fecerit securum*. The *præcipe* is in the alternative, "commanding the defendant to do the thing required, or shew the reason why he hath not done it." The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; *as to restore the possession of land, to pay a certain liquidated debt, to perform*

The use of the writ.

perform a specific covenant, to render an account, and the like; in all which cases the *præcipe* is drawn up in the form of a command to do thus, or shew cause to the contrary; giving the defendant his choice to redress the injury, or stand the suit. The other is called a *fi te fecerit securum*; from the words of the writ, which direct the sheriff "to cause the defendant to appear in court, without any option given to him, provided the plaintiff gives the sheriff security effectually to prosecute his claim." This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and minister complete redress, the intervention of some judicature is necessary: such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end, the defendant is immediately called to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both writs are tested or witnessed in the king's own name: "*Witness ourself at Westminster, or wherever the chancery may be held.*"

Si te fecerit securum.

The security here spoken of, to be given by the plaintiff, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and *John Doe* and *Richard Roe* are always returned as pledges for this purpose. The use of them was to answer for the plaintiff, who, in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown, for raising a false accusation; and so the form of the judgment still is. *Finch.* 189. 252.

Security.

The day on which the defendant is ordered to appear in court, and in which the sheriff is to bring in the writ, is called the return of the writ; it being then returned by him to the king's bench at *Westminster*, and made returnable in term, at the distance of at least fifteen days from the date or teste, that the defendant may have time to come up to *Westminster*, even from the most remote parts of the kingdom.

Return day.

This writ cannot issue unless the cause of action amounts to ten pounds, or above, on pain of ten pounds, and the proceedings thereon to be void. 5 Geo. 2.

Cannot issue unless for 10l.

6. 27. 21 Geo. 2. c. 3.

D 2

And

If plaintiff proceed by special original.

And by rule *M. 23 Geo. 3.* If the plaintiff proceed by *special original*, and recover less than 50*l.* he is only to have the same costs as if he had proceeded by *bill*; except in such actions in which he could not proceed by *bill*, or in which any defendant shall be *actually outlawed*.

Proceeding by bill.

A *bill*, is a shewing in writing the cause of complaint by the plaintiff against the defendant, wherein the party is supposed to have received some wrong, and it is the ground-work of the cause; it need not be filed in the office (unless the defendant have privilege, or be in actual custody of the marshal or sheriff); but if he be in actual custody, then it must be filed to warrant the declaration; which is no more than a copy of it, or *defendant will be entitled to his discharge*.

Filing the bill, ground-work of the cause.

The *filing the bill* is the *ground-work* of the cause depending, and is as the *original* in the common pleas, which gives the court jurisdiction to hold plea.

If the defendant is not in custody, the ordinary course of proceeding is by process, intitled a bill of *Middlesex*; being so called because the court now sits in that county.

Of the bill of Middlesex.

The bill of *Middlesex* (a), (which was formerly founded on a plaint of trespasss *quare clausum fregit*, entered on the records of the court,) is a kind of *capias* directed to the sheriff of that county, and commanding him to take the defendant, and have him before the king at Westminster, on a day prefixed, to answer to the plaintiff of a plea of trespasss; for the accusation of trespasss gives the court jurisdiction, whatever else may be the real cause of action. It must be personally served on the defendant, if he can be found in that county; but if not, then there issues out a writ of *latitat* to the sheriff of another county (as *Oxon*), which recites the bill of *Middlesex*, and proceedings thereon, thus: "*And that it is testified that the defendant,*" "*latitat*" "*& discurrit,*" *lurks and wanders about in Oxfordshire;*

Latitat.

Formerly process issued on bill being filed.

(a) Formerly this process issued upon the *bill* being filed, with the name of the *chief clerk*, and was called a *bill* of that county wherein the court then resided, because the *marshal*, being an officer of the king's household (in whose custody the defendant was supposed to be), was then in that county. It is called a *bill of Middlesex* to distinguish it from the *original bill*, or *declaration*.

"and

(a) T
latitat,
nature o

"and therefore commands the sheriff to take him, and have his body in court on the day of the return (a)."

But if the defendant lives in any other county, the *latitat* is the first process which issues to take him, and may be sued out upon a supposed, and not an actual bill of *Middlesex* issued prior; a notice in writing being wrote at the bottom of such writ or process directed to the defendant to appear by his attorney in court, to defend the action, to which the defendant may appear or not; which is recorded. If he appears, he finds sureties for his future attendance and obedience, called *common bail*, being the same persons that are pledges for the plaintiff's prosecution, viz. *John Doe* and *Richard Roe*. If the defendant does not appear upon the return, or in eight days after, the plaintiff may enter an appearance for him, and proceed thereupon, as if the defendant had done it himself.

Appearance.

Plaintiff may appear in default.

12 Geo. 1. c. 29. 21 Geo. 2. c. 23.

But if the defendant is held to bail, there must be added to these writs a clause of *ac-etiam* to the usual complaint of trespass; the bill of *Middlesex*, commanding the defendant to be brought in to answer the plaintiff in a plea of trespass, "And also to a bill to be exhibited against him for one hundred pounds debt, or upon promise, as the case is," the complaint of trespass giving cognizance to the court, and that of debt authorising the arrest. Stat. 13 Car. 2. stat. 2. c. 2.

If defendant be held to bail.

When the defendant is regularly arrested, he must either go to prison for safe custody, or put in *special bail* to the sheriff; the intent of the arrest being only to compel an appearance in court at the return of the writ: that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called *bail*, and he is supposed to continue in the custody of the bail, instead of going to gaol.

When defendant is arrested.

Upon the return of the writ, or within four days after, the defendant must appear according to the exigency of the writ^b. This appearance is effected by putting in, and justifying bail, to the action. If

Bail.

^bIn London and Middlesex, but if in any other county six days.

(a) This writ was called a *testatum*, but gained afterwards the name of *latitat*, from that word therein *cum testatum est quod latitat*, &c. and is in nature of a *testatum bill*.

If the bail to the sheriff be insolvent.

When bail must be put in.

If by bill.

If by original.

May discharge themselves.

Declaration.

this be not done, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the *stat. 4th and 5th Ann. c. 16.*), and bring an action thereupon against the sheriff's bail: But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him first, to return the writ, (if not already done,) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be perfected, (or surrender him on the fourth or sixth day mentioned in the latter rule,) he will himself be responsible to the plaintiff, by an attachment, for not obeying it.

The bail must be put in either in *open court*, or before one of the *judges thereof*, or else in the country before a commissioner appointed by the *stat. 4 & 5 W. & M. c. 4.* which must be transmitted to the court and filed. These bail, who must at least be *two in number*, if the action be *by bill*, must enter into a *recognizance* before such judge or commissioner to this effect, "*that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, to the custody of the marshal, or that they will do it for him;*" which recognizance is transmitted to the court on a slip of parchment, intitled a *bail piece*: If *by original*, the recognizance is in a *certain sum*, being *double the debt sworn to*; and, if required, the bail must justify themselves in court, (or before the commissioner in the country, by affidavit,) "*by swearing themselves housekeepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts.*"

They may now discharge themselves by surrender without justifying, after exception, or before the expiration of the rule to bring in the body, or after the bond is assigned, or on the return-day of the first *sci. fa.* if returned *scire feci*, or on the return-day of the second *sci. fa.* if the *first* be returned *nihil*. But such render is not complete till an *exoneretur* is entered on the bail-piece; see title *Surrender*. In an action on the recognizance he is to surrender in *eight days in full term next after the return of the writ of latitat*, &c.

When the defendant has filed *common bail*, or put in *special bail*, as the case requires, the next proceeding

ing on the part of the plaintiff is, to *declare against him* (if he has not done it previous by filing the declaration *de bene esse* on the return-day, which he may do by *R. T. 22 Geo. 3.*) by *delivering* a declaration, which is the *complaint*, being an amplification or exposition of the original writ (if the plaintiff proceeds by original) upon which his action is founded; but the declaration upon the bill is a mere copy of it (a): When the defendant is brought into court, if the action is *by bill*, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper (unless he has held him to bail by a special *ac-etiam*, which the plaintiff is then bound to pursue); but care is to be taken how such declaration is framed, as the law requires it should contain four things, *viz. truth, certainty, order, and congruity*; and in personal actions, the *day, year, and place* ought to be expressed, but not in *real actions*.

This declaration concludes with these words, "*and thereupon he brings his suit,*" &c. by which word *suit* was anciently understood the witnesses or followers of the plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out, at least, a probable cause. *Braet. 400.* At the end of the declaration, if the suit be *by bill*, are added also the plaintiff's common pledges of prosecution, "*John Doe* and "*Richard Roe,*" which are now mere names of form; though formerly they were of use to answer to the king for the amerciamment of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him. *3 Bulst. 275.* Vide my *Mod. Pleader, 41. 46. 62.*

Conclusion of declaration.

When the plaintiff has stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defence, and put in a plea, or else the plaintiff will at once recover judgment by default against him. Vide *R. Trin. 22 Geo. 3.* being the latest rule.

Defence is a general assertion that the plaintiff hath no good ground of action, which assertion is afterwards extended and maintained in his plea; but before

Defence.

(a) The declaration is a legal specification of the cause of action. *Tidd, 221.*

he puts in his plea, he may *crave oyer of the bond* or other *specialty* upon which the action is brought; that is, to hear it read to him, the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves, whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition, or other part of it, not stated in the plaintiff's declaration.

Cannot have oyer of original.

The defendant cannot now *crave oyer* of the original writ. *Boats v. Edwards*, *Dougl. Rep.* 227. For it is not warranted by any rule or principle of justice, and it is incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive as possible. *Ibid.*

Plea.

Pleas are of two sorts, *dilatory*, and *pleas to the action*. *Dilatory*, are such as tend merely to delay or put off the suit by questioning the propriety of the remedy, rather than by denying the injury. *Pleas to the action*, are such as dispute the very cause of suit. The former cannot be pleaded after a *general imparlance*, which is an acknowledgment of the propriety of the action; but the latter may.

Pleas in abatement.

They are either to the *jurisdiction of the court*, the *disability of the plaintiff*, or, in *abatement to the writ, or count*, as by *misnaming* the defendant, which is called a *misnomer*, or other want of form in any material respect; or it may be that the *plaintiff is dead*, or of a *suit depending in another court, for the same cause of action*.

Requisites of the plea.

The general requisites of a plea in abatement are, that it should be certain to every intent, *Co. Lit.* 303. give the plaintiff a better writ, *Brownl.* 139. and have an apt and proper beginning and conclusion: for it is the *beginning* and *conclusion* that make the plea. 1 *Ld. Ray.* 593.

The former were very often used without any foundation of truth, and calculated only for delay; therefore by 4 & 5 *Ann. c.* 16. affidavit must be made of the truth thereof.

In cases where the matter is pleaded in abatement, which appears upon the record, (as *variances*,) no affidavit is requisite. 2 *Ld. Ray.* 1409. So want of addition. *Pract. Reg.* 5.

Plea to the jurisdiction.

If you plead to the *jurisdiction*, you only make half a defence, that is, "*defends the wrong and injury*," for if

if you say, "*when, &c.*" it gives a jurisdiction to the court, *Co. Lit.* 127. and conclude to the cognizance of the court, "*praying judgment whether the court will have further cognizance of the suit,*" *Salk.* 298. *pl.* 9. and must be pleaded in person. *Gill.* *C. P.* 187.

Before a plea in abatement can be pleaded, it is requisite for the defendant to appear, and take the declaration out of the office.

On a plea to the jurisdiction, on special privileges, it is usual to grant a special imparlance, as in the common case of cognizance for Oxford, &c. but they cannot imparl generally. *Comb.* 68.

Cognizance of pleas must be claimed after appearance, *Comb.* 319. and before imparlance, *1 Sid.* 103. *2 Wilf.* 413.

In pleading to the writ or count, if the action be by original, the plea concludes by praying judgment of the writ or count, and that the same may be quashed. *5 Mod.* 132. But if the action be by bill, the plea should conclude by praying judgment of the bill, or of the bill and declaration, (for they are the same thing,) and not of the declaration only. *12 Mod.* 133. A plea of misnomer praying judgment if the bill, and that the same may be quashed, is ill on special demurrer. *3 Term Rep.* 185.

Pleas to the jurisdiction (except ancient demesne) and pleas in abatement, ought to be pleaded before a general imparlance, within four days inclusive of both days, after delivery or filing the declaration; unless it be filed or delivered after term, or so late in the term that defendant is not bound to plead to it that term; in both which cases the defendant may, within four days inclusive of the next term, plead to the jurisdiction of the court, or in abatement, intitling his plea as of the preceding term. *N. on R. E.* 5 *Ann.* 1 *Salk.* 367.

If it be pleaded as of the next term, then there must be a special imparlance moved for, *R. E.* 5 *Ann.* which should be stated on the record (meaning the roll). *Doughty v. Lascelles*, 4 *Term Rep.* 520. 3 *Term Rep.* 627. *Smith v. Miller*. And Sunday is to be counted one of the four, unless it be the last; if so, then defendant has all Monday to file his plea. *Lee v. Carlton*, 3 *Term Rep.* 642.

The

Plea to the jurisdiction.

Cognizance.

Conclusion of pleas by original, and by bill.

Pleas to the jurisdiction, &c. when to be pleaded.

If pleaded of the next term.

R. E. 5 Ann.
Lil. Pr. Reg. 3.
5 Term Rep.
270.

The plea in abatement is to be pleaded *within the time*, whether a rule be given or not, and filed, signed by counsel. 1 Term Rep. 278. Previous to which, the declaration must be taken out of the office, or plaintiff may sign judgment.

When these are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend his declaration. Co. Entr. 271. But when they are over-ruled on demurrer, there shall be a judgment of *respondeas ouster*, or that the defendant answer over. 2 Wils. 368. *Eichborn v. Le Maitre*, Carth. 447. 5 Mod. 399. Ray. 329. It is then incumbent on him to plead a plea to the action; that is, to answer the merits of the complaint, which is done by confessing or denying it.

On a plea of
misnomer if
issue be joined
thereon, the
judgment is
peremptory.

But where the issue is joined on a plea of *misnomer* in the defendant's christian name, and issue be taken thereon, and a verdict be found for the plaintiff, the judgment is peremptory; and there is no difference whether the issue be joined in a plea in abatement, or in a plea in bar; for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false. *Ibid.* Bro. tit. Peremptory, 906.: and if the issue be found for the defendant, he is entitled to costs. 2 Ld. Ray. 292. So for the plaintiff.

Confession.

A confession of the whole complaint is not usual, for by that, the defendant ends the matter; to avoid which he may suffer judgment to go by default. But frequently he confesses one part of the complaint, (by a *cognovit actionem* in respect thereof,) and traverses, or denies the rest, in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is by payment of money into court; which is necessary upon pleading a tender, or by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, which (in the latter case), if the plaintiff accepts in full satisfaction, he will be entitled to his costs to be taxed; but if *after* the money is so paid into court, the plaintiff does not accept the same in full, he is at liberty to take the money

Payment of money into court.

ney out of court, and proceed for further damages which will be with the costs hitherto incurred, in order to prevent the expence of any further proceedings, at his own peril. He may also plead a set-off, whereby the defendant acknowledges the justness of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own to counter-balance that of the plaintiff, either in the whole, or in part; but this must be where there are *mutual debts* between the parties. 2 Geo. 2. c. 22. 8 Geo. 2. c. 24.

Pleas that totally deny the cause of complaint, are either the *general issue*, or a *special plea in bar*. General plea.

The general issue, or general plea, is what traverses, thwarts, and denies the whole declaration; without offering any special matter to evade it, as in trespass, either *vi et armis*, or on the case for consequential damage, *not guilty*; in debt upon contract, *nil debet, he owes nothing*; in debt on bond, *non est factum, it is not his deed*; on an assumpsit, *non assumpsit, he made no such promise*; or in real actions, *nul tort, no wrong done*; *nul disseisin, no disseisin*; and in a writ of right the mise or issue is, *that the tenant has more right to hold, than the demandant has to demand*. These pleas are called the general issue, because, by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue; by which is meant a fact affirmed on the one side, and denied on the other. General issue, definition of.

Special pleas in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case; as, in real actions, a *general release, or a fine*, both of which may destroy and bar the plaintiff's title. Or in personal actions, *an accord, arbitration, conditions performed, non-age of the defendant*, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the original thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. The statute of limitations may also be pleaded in bar, for which, see the several statutes under title *Limitation of Actions*. Special pleas in bar.

The

Qualities of a
Plea.

The conditions and qualities of the plea are:
1. That it be single, and contain only one matter, for duplicity begets confusion. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons: 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial. *Co. Lit.* 303, 304. It should be true, and capable of proof; and will be taken most strongly against him that pleadeth it: and surplusage shall never make the plea vicious, except when it is repugnant or contrary to matter precedent. *Hob.* 295. *Mar.* 207.

Cannot plead a
special plea,
which amounts
to the general
issue.

They are usually in the affirmative, sometimes in the negative, but always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form, "*and this he is ready to verify*;" and it is a rule in pleading, that no man be allowed to plead *specially*, such a plea as amounts only to the general issue, or a total denial of the charge; for pleas that amount to the general issue, are only facts on which the issue may be turned in evidence, and therefore are not issues of fact to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they draw to the examination of the court what is proper to be determined by a jury; but when such plea is pleaded, it is a good cause of special demurrer, since the *stat.* 27 *Eliz.* 10 *Co.* 95. *a. Roll. Rep.* 112. *Cro. Car.* 157. being only matter of form. 3 *Mod.* 166.

Replication.

When the plea of the defendant is put in or filed, if it does not amount to an issue or a total contradiction of the declaration, but only evades it, the plaintiff may plead again, and reply to the defendant's plea, which is called a replication: either traversing it, that is, totally denying it; as if in an action of debt upon bond, the defendant pleads *solvit ad diem*, here the plaintiff in his replication may totally traverse this plea, by *denying that the defendant paid it*; or he may alledge new matter in contradiction to the defendant's plea; as when the defendant pleads *no award made*, the plaintiff may reply and set forth *an actual award*, and assign a breach: or the replication may confess and avoid the plea by some new matter or distinction,

tion, consistent with the plaintiff's former declaration.

To the replication the defendant rejoins, or puts in an answer called a rejoinder. The plaintiff may answer the rejoinder by a surrejoinder, upon which the defendant may rebut; and the plaintiff may answer him by a surrebutter. The whole is denominated the pleading, in the several stages of which it must be carefully observed, not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder the plea, without departing out of it; yet in many actions the plaintiff, who has alledged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more peculiar certainty, by *assigning the injury afresh*, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint, which is called a *new or novel assignment*. 1 Inst. 124. 6 Mod. 120. 2 Ld. Ray. 1015. Bull. Nis. Pri. 17.

Rejoinder.

Novel assignment.

In any stage of the pleadings, when either side advances or affirms any new matter, he usually avers it to be true, "*and of this he is ready to verify*." On the other hand, when either side traverses or denies the fact pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "*and of this he puts himself upon the country*," thereby submitting himself to the judgment of his peers; but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the peers against the defendant in another form; thus, "*and this he prays may be inquired of by the country*;" for when in the course of pleading they come to a point, which is affirmed on one side, and denied on the other, they are then said to be at issue, all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

Averments on an issue taken.

But if either side (as for instance the defendant) pleads a special negative plea, not traversing or denying any thing that was before alledged, but disclosing some new negative matter; as where the suit is on a bond, *conditioned to perform an award*, and the defendant pleads negatively, "*that no award was made,*" he tenders no issue upon this plea, because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an *actual specific award*, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff, which being the end of all the pleadings, is either matter of law or fact.

Demurrer.

An issue upon matter of law, is called a *demurrer*; *demoratur*, rests or abides; and it confesses the facts to be true, as stated by the opposite party; but denies, that by the law arising upon those facts any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs upon the point in question. As if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if on the other hand the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea, and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case: and upon the parties joining in demurrer, the issue is then complete, and the proceedings being entered on record, the matter of law on which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given.

Issues in law
and fact.

Where there are issues *in law*, and *in fact*, the determination of the issues in law may be either *before* or *after* the trial, at plaintiff's election: but if the *issues* be tried *first*, the court will not give leave to *withdraw the demurrer and plead*, although the court would have permitted it after demurrer argued. 1 Burr. 316. *Robinson v. Raley*, Say. Rep. 316.

An

An issue of fact is where the fact only and not the law is disputed; and when he that denies or traverses the fact pleaded by his antagonist has tendered the issue thus, "*and this he prays may be inquired of by the country*;" or, "*and of this he puts himself upon the country*," it may be immediately subjoined by the other party, "*and the said A. B. doth the like*;" which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question to the determination of a jury.

Issue of fact.

During the whole of these proceedings from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be continued in court from day to day, till the final determination of the suit. In the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *non suit*, or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default; and, after issue or demurrer joined, as well as some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear from time to time, as the exigence of the case may require. The giving of this day is called *the continuance*, because thereby the proceedings are continued without interruption, from one adjournment to another.

Continuances.

Non suit.

Of the Plea puis darrein continuance.

It may sometimes happen, that after defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some *new matter*, which it is proper for the defendant to plead; as, that the plaintiff has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, *viz. at the day given for his next appearance*, he is permitted to plead it, and it is called a plea *puis darrein continuance*, or since the last adjournment; for it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former: It is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties, *Cro. Eliz.* 49. and waives

Puis darrein continuance, when to be pleaded.

waives

When not allowed to be pleaded.

waives the former pleading; and it is not allowed to be put in, if any *continuance* has *intervened* between the arising of this fresh matter, and the pleading of it, 2 *Wils.* 138. for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. *Say.* 268. *Ld. Ray.* 693. *Salk.* 178. After a plea *in bar*, if the defendant plead a plea *puis darrein continuance*, this is a *waiver of his bar*, and no advantage shall afterwards be taken of it, 1 *Salk.* 178.: also it is not allowed after a *demurrer* is determined, or *verdict given*; because then relief may be had in another way, namely, by writ, of *audita querela*, which is in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. This writ is now almost rendered useless, since the courts have shewn so much indulgence in granting a summary relief upon motion. *Ld. Raymond*, 439.

Audita querela.

But one plea.

A man shall have but one plea *puis darrein continuance*. 4 *H.* 7. fol. 8.

The *last continuance* at the sittings or assizes is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* to the next term, unless the chief justice or judges of assize shall first come on the day of *nisi prius*. *Bull. N. P.* 310. 1 *Black. Rep.* 497. *Dy.* 361. And on this day, if any matter of defence has arisen after the last continuance, it may be pleaded. These pleas are twofold, in *abatement* and *in bar*. *Gilb. C. P.* 105.

Plea *puis darrein cont.* cannot be rejected if verified by an affidavit.

Issue was joined, *venire facias* was awarded, returnable *quindecim Hil.* 27th January: after this last continuance, the defendant, on the 30th of January, pleaded generally, that *puis darrein continuance*, viz. on such a day, he became bankrupt, *hoc paratus est verificare*, &c. and verified this plea by an affidavit. Motion to set it aside as a dilatory plea, alledging it to be discretionary in the Court whether they would receive it or not. *C. J.* said, "That such discretion was contrary to the genius of the common law of England, and would be more fit for an eastern monarchy than for this land of liberty; *nulli negabimus*, &c. *justitium*;" and there is no difference between this plea and any other defence, but this, viz. that the fact which warrants this plea first existed or happened since the last, and before the next continuance; it is a defence which the party could not possibly make when he first pleaded, and which he is bound to make after the last continuance,

ance, and before the next. *It must be verified by affi-* Affidavit,
davit; for if it was not to be so, great delays would
ensue by pleas of this kind. *Paris v. Salkeld*, 2 *Wilf.*
137. 1 *Str.* 492. If such plea is bad it must be de-
termined on demurrer. Rule discharged.

The plea in this case was held bad, because it did
not aver that the defendant *had conformed himself*, &c.
according to the several statutes concerning bankrupts. *Ibid.*
140. The justices may receive such plea at *nisi prius*.
2 *Roll.* 630. l. 30. 3 *Term Rep.* 554.

It is said, if this plea be put in at the assizes, the As to replic. to
plaintiff is not to reply to it there; for the judge has the plea.
no power to accept a replication, nor to try it, but
ought to return the plea, as parcel of the record of
nisi prius, and if the plaintiff demur, it cannot be ar-
gued there. 2 *Mod.* 307.

Mr. Just. Buller says, it is in the breast of the judge,
whether he will or not proceed in the trial. *Bull.*
N. P. 309. 311. *Say.* 268.

It cannot be pleaded *after the day of nisi prius*, and When it cannot
before the day in bank, 2 *Lut.* 1143. *if there has* be pleaded.
been a verdict. But if the jury remains *propter defec-*
tum, a release after the award of the *nisi prius*, may
be pleaded *the day in bank*. *Bro. Cont.* 30. 22 *H.*
6. 1.

This plea should be ingrossed on treble-penny,
signed by counsel, and affidavit is to be made of the
truth, and in term, I take it if there are special
pleadings it ought to be filed, notice being given on
the other side; if tendered at *nisi prius*, court should
be moved to receive it. If there are *no* special plead-
ings, then the plea may be delivered to the attorney in
term-time. *Sed quære*.

The plea must contain *certainty*, and the *time* and
place must be precisely alledged, *Bull. N. P.* 309. 2
Salk. 519. and, if pleaded in bar, to conclude *that the*
plaintiff ought not further to maintain his action. *Bull.*
311. *Gilb. C. P.* 105. 3 *Lew.* 120.

In *Hob. Rep.* 81. it is said, it may be pleaded *after*
a demurrer.

How to plead a release *puis darrein continuance*,
Lut. 1142. before issue joined, 1177.

When the parties are at issue as before-mentioned, *Venire*,
the court awards a writ of *venire facias* upon the roll,
commanding the sheriff, "that he cause to come at
E
"Westminster,

Distringas.

" Westminster, on such a day, twelve free and lawful
 " men of the body of the county, by whom the truth of the
 " matter may be better known, and who are neither of kin
 " to the plaintiff or defendant, to recognize the truth of
 " the issue between the parties." The jury is not sum-
 moned upon this writ, and therefore not appearing at
 the day, must unavoidably make default, and a com-
 pulsive process is now awarded against the jurors,
 called a *distringas*, " commanding the sheriff to have the
 " bodies of the jurors, or to distrain them by their lands
 " and goods, that they may appear upon the day ap-
 " pointed, (*nisi prius*,) unless before that day, the chief
 " justice shall come into London, Westminster, or the
 " county where the venue is laid."

This clause of *nisi prius* was inserted by virtue of
 the statute of *Westminster*, 13 Ed. 1. c. 30. 42 Ed. 3.
 c. 11.

Nisi prius record.

When the general day of trial is fixed, the plaintiff
 or his attorney must bring down the record (which is
 previously passed) to the assizes, and enter it with the
 judge's marshal, in order to its being called on; but
 if the cause is to be tried at the sittings in *London* or
Westminster, the record is taken to the chief justice's
 chambers, and his clerk enters it for trial. When the
 cause is called on either at the assizes or at the sittings,
 the record is then handed to the judge to peruse and
 observe the pleadings, and what issues the parties are
 to maintain and prove, while the jury is called and
 sworn: the case is opened on the part of the plaintiff
 and defendant by their counsel, and when the evidence
 is gone through on both sides, the judge, in the presence
 of the parties, the counsel, and all others, sums up the
 whole to the jury, observing wherein the main ques-
 tion and principal issue lies, stating what evidence has
 been given to support it, with such remarks as he
 thinks necessary for their direction, and giving them
 his opinion in matters of law arising upon that evi-
 dence; they consider and return their verdict at the
 bar; which is recorded in court by the proper officer,
 and then they are discharged.

Postea.

If the issue be found either for the plaintiff or de-
 fendant, or specially; or if the plaintiff makes default,
 or is nonsuit; it is entered on the record, and is called
 a *postea*; which being entered, judgment may be signed
 thereon, unless ordered by the court to the contrary,
 for

for the verdict may be suspended for certain causes by a motion for a new trial, or arrested. 6 Mod. 22. Salk. 649. 1 Burr. 390.

But if the judgment cannot be arrested, or the party obtain a new trial, execution will follow; unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse the same by bringing a writ of error; but he that brings it must find substantial bail (to prosecute the same) after verdict in all cases, and must bring it in time so as to prevent the plaintiff's taking out execution after judgment signed. Vide 3 Jac. 1. c. 8. 13 Car. 2. c. 2. 16 & 17 Car. 2. c. 8.

The execution of the judgment is adapted to the nature of the action; therefore if the plaintiff recover in a real or mixed action, wherein the seisin of the land is awarded to him, the writ is an *habere facias seisinam*, or an *habere facias possessionem*. Finch, 470. Co. Lit. 34.

Executions in actions where money only is recovered, as a debt or damages, at the suit of the subject, (and not any specific chattel,) are of four sorts; against the body of the defendant, called a *capias ad satisfaciendum*, or against his goods and chattels, called a *feri facias*; or against the goods and the profits of his lands, called a *levari facias*; or against the goods and the possession of his lands, called an *elegit*; but at the suit of the king against all three, his body, lands, and goods, called an *extent* or *extendi facias*. Only one of these writs can be issued at one time. 2 Inst. 143. Co. Lit. 293. T. Raym. 346.

When the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by compulsory process, or otherwise, the defendant may compel the plaintiff to enter satisfaction on the record, that the defendant may not be liable hereafter to be harassed a second time on the same account; which is done by giving a warrant of attorney for that purpose. 2 Lill. Abr. 605.

Of the Judges and Officers of the Court.

Probable that our kings determined causes, who delegated their power to the judges.

IT is probable and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party; but at present, by the long and uniform usage of many ages, they have delegated their whole judicial power to the judges of their several courts; which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter, but by act of parliament. 2 *Haw. Pl. of the Cr.* 2.

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power: were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative: for which reason, by the statute of 16 *Car. I. c. 10.* which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council, who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than limiting the provinces of a judge and a minister of state.

As to the judges.

As his majesty is, in the eye of the law, always present in all his courts, though he cannot personally distribute justice, his judges are the mirror by which the

the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. *Co. Lit.* 139. *Fortesc.* c. 8.

It is of the greatest importance to the law of *England*, and to the *subject*, that the powers of the judge and jury are kept distinct; that the *judge* determines the *law*, and the *jury* the *fact*; and if ever they come to be confounded, it will prove the confusion and destruction of the law of *England*, per *Hardwicke*, *C. J.* *Rep. temp. H.* 28.

By whom the law is to be determined.

The *judges of assize* are delegated from the courts at Westminster by the king, if the trial be held in the country: *persons* whose *learning* and *dignity* secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace and the like. And the better to remove all suspicion of *partiality*, it was wisely provided by statutes 4 *E.* 3. c. 2. 8 *R.* 2. c. 2. 33 *H.* 8. c. 24. that no judge of assize should hold pleas in any county wherein he was *born* and *inhabits*. And as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule, and the administration of the laws uniform. 3 *Black. Com.* 356. *Vide title Circuit*, and 12 *Geo.* 2. c. 27.

Judges of assize whence delegated.

The judges of this court consist of the *Lord Chief Justice*, and *three others*; the *former* is created by *writ*, and the *latter* by *letters patent*; and by the *stat.* 20 *Edw.* 3. c. 1. they are to take no fee but of the king; their commissions, in early periods, were *durante bene placito*, afterwards *quamdiu bene se gesserint*, with a power to remove them on the address of both houses of parliament; but now they are to continue in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secure to them during the continuance of their commissions. 1 *Geo.* 3. c. 23. This act was made at the earnest recommendation of the king himself

Four judges.

JUDGES and OFFICERS of the COURT.

self from the throne, “ declaring that he looked upon the
 “ independance and uprightness of the judges, as essential
 “ to the impartial administration of justice, as one of the
 “ best securities of the rights and liberties of his subjects,
 “ and as most conducive to the honor of the crown.” *Com.
 Journ.* 3 Mar. 1761.

They are sovereign justices of oyer and terminer,
 gaol delivery, and of eyre, conservators of the peace,
 and sovereign coroners of the land. 4 *Inst.* 73. 9 *Co.*
 118. b.

The present Judges are ^b,
 Lloyd Lord Kenyon, 5500*l.* 9th June 1788.

Sir William Henry Ashburst, Knight, 22d June
 1770,

Sir Nash Grose, Knight, 9th February 1787, } 2400*l.*
 Sir Soulden Lawrence, Knight, — June, 1794, }

Sir Francis Buller resigned his seat in K. B. in E.
 Vac. 1794, and made a justice of C. B. Trin. Term
 1794, in the room of Sir Soulden Lawrence.

If an action be brought against a judge of record for
 an act done in his judicial capacity, he may plead that
 he did it as judge of record, and that will be a sufficient
 justification; and so may a judge of a court in a
 foreign country under the dominion of the crown.
Mostyn v. Fabrigas, *Cowp. Rep.* 172. *Ld. Ray.* 454.
Gromvelt v. Burwell.

Officers of the Crown Side are,

THE king's coroner and attorney, commonly called
 the clerk of the crown, or master of the crown
 office, who taxes costs, nominates all special juries on

^b The law delighteth in the number of 12, for there must not only be 12
 jurors for the trials of matters of fact, but 12 judges of antient time for mat-
 ters in law in the Exchequer chamber. Also for matters of state, there
 were in antient time 12 counsellors of state. He that wagheth his law
 must have 11 others with him, which think he says true. And that
 number of 12 is much respected in holy writ, as 12 apostles, 12 stones,
 12 tribes, &c. *Co. Lit.* 155. a. By later authorities fewer than 12
 compurgators will do. 2 *Vent.* 17. *Lilly* says 6. *Prac. Reg.* 824. But Mr. J.
 Blackstone says, that *Ld. Coke's* opinion is founded upon better authority and
 reason, for as wager of law is equivalent to a verdict in the defendant's favor,
 it ought to be established by the same or equal testimony, by the oath of
 12 men; to is *Glanvil*, b. 1. c. 9. *jurabit duodecima manu*; and in 9 *H.* 3.
 it was adjudged by the court, *quod defendat se duodecima manu*. *Hengham*,
Magna Ch. 5. *Lilly* takes his from *Style's P. R.* 572.

the crown side, takes recognizances, inquisitions upon the death of any prisoner dying in the King's Bench, &c. *James Templar, Esq.*

The secondary, who draws up the paper books and makes up an *estreat* of all fines, &c. forfeited to the crown, *Francis and Henry Barlow, Esqrs.*

The clerk of the rules, who draws up all the rules of the court, and attends the court to take minutes thereof, *Henry Dealtry, Esq.*

There are also two other officers, the *examiner* and *calender keeper*, *Robert Belt.*

Clerks in court. *F. Barlow, R. Belt, G. Lepipre, J. O. Jones, H. Dealtry, and H. Barlow, Esqrs.*

On the Plea Side.

THE chief clerks, *secondary* or *master*, their *deputy*, *marshal*, *clerk of the rules*, *clerk of the papers*, *clerk of the day rules*, *clerk of the dockets*, *clerk of the declarations*, *clerk of the bails*, *postea*s, and *estreat*s, *signer of writs*, *signer of the bills for Middlesex*, *custos brevium*, *clerk of the upper treasury*, *clerk of the outer treasury*, *filacer*, *exigenter*, and *clerk of the outlawries*, *clerk of the errors* *deputy marshal*, *marshal* and *associate* to the chief justice, *train-bearer*, *clerk of the nisi prius in London and Middlesex*, *clerks of the nisi prius to the different counties appointed by the custos brevium*, *crier at nisi prius in London and Middlesex*, *receiver general of the seal office*; *criers*, *ushers*, and *tipstaffs*.

Chief clerks. *Earl Mansfield and John Way, Esq.*

Secondary. *Robert Foster, Esq.*

Assistant. *Frederick Groves, Esq.*

Marshal. *William Jones, Esq.*

Clerk of the rules. *Charles Abbot, Esq.*

Assistant. *Mr. Samuel Card.*

Clerk of the papers. *Robert Austen, Esq. Mr. W. B. Radcliffe, Dep.*

Clerk of the day rules. *William Jones, Esq.*

Clerk of the dockets. *John Stride, Dep. Mr. Clarke officiates.*

Clerk of the declarations. *Deputy, L. Maddocks.*

*Clerk of the common bails, postea*s, and *estreat*s. *Richard Walter Nelson, Esq.*

OFFICERS of the COURT.

Signer of the writs. Messrs. Provost and Webb.
Signer of the bills for Middlesex. Mr. Booth Brathwaite.

Custodes brevium. Sir David Lindsay, Bart. John Way, Esq.

Clerk of the upper treasury. Mr. Thomas White.

Clerk of the outer treasury. Mr. Edge.

Filacer, exigenter, and clerk of the outlawries. The Hon. Geo. Kenyon.

Filacer for Essex and Monmouthshire. And. Edge, Esq.

Clerk of the errors. Roger Kenyon, Esq. Dep. Mr. P. Parry.

Deputy Marshal. John Jordan.

Marshal and associate to the chief justice. Roger Kenyon, Esq. Mr. Jones, Dep.

Trainbearer. Mr. Williams.

Clerk of nisi prius in London and Middlesex. T. Lowten, Esq.

Crier at nisi prius in London and Middlesex. Mr. Philip Parry.

Receiver general of the profits of the seals in K. B. and C. P. Duke of Grafton.

Dep. Mr. Samuel Rogers.

Sealer. Joseph Neale, Gent.

Clerk to the lord chief justice. Mr. T. Platt.

Criers and ushers. Mr. Lloyd, Mr. Player, Mr. Hewett, Mr. Nithercliff.

Tipstaff to lord chief justice. Mr. George Wilkinson.

To the other judges. T. Ridgway, W. Rogers, and W. Milward.

The clerk of the papers of the K. B. prison cannot act by deputy, but must himself reside within the prison, 27 Geo. 2. c. 17. *Rex v. Bryant*, 4 Term Rep. 76.

Attornies of the Court.

Definition.

AN attorney, *attornatus*, or *attornatus* in law, is an officer appointed by the court, to prosecute or defend actions brought against or prosecuted by their clients: and the word is compounded of the Latin word *ad*, to, and the French, *tourner*, to turn: "to turn a business over to another." The ancient Latin name,

name, according to *Bracton*, is *responsalis*; and they answer to the *procurator*, or proctor of civilians and canonists.

Attorney is an antient *English* word, and signifies one that is set in the turn, stead, or place of another; some be private, and some be public, as attorney at law, whose warrant from his master is, *ponit loco suo attornatum suum*, which setteth in his turn or place, such a man to be his attorney. *Co. Lit.* 51. b.

Before the *stat.* of *West.* 2. c. 10. all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be attorney to such a one. 2 *Inst.* 249. That statute gave all persons liberty of appearing by attorney without any letters patent, otherwise they were to appear each day in court in their proper person; in consequence of which, great numbers of attornies were admitted by the judges, whereby many unskilful ones practised, which occasioned many mischiefs: for restraining of which, it was enacted by *stat.* 4 *H.* 4. c. 18. "That the judges should examine them, and at their discretion to put those who were virtuous and of good fame on the roll, and those on the contrary to strike out." And the *stat.* 33 *H.* 6. c. 7. limited the number in *Norfolk* and *Suffolk*. The attornies of *B. R.* are of record as well as the attornies of *C. B.* 1 *Roll.* 3. and it is now the common course for the plaintiff or defendant to appear by attorney, *F. N. B.* 26. *D.* But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *Ibid.* 262. Outlawry is excepted by *stat.* 4 & 5 *W.* & *M.* c. 18.

By 13 *W.* 3. c. 6. attornies are to take the oaths to government, under penalties and disability to practise.

12 *Geo.* 1. c. 29. If any who hath been convicted of forgery, perjury, subornation of perjury, or common barrettry, shall practise as an attorney or solicitor or agent in any suit or action brought in any court of law or equity within *England*, the judge hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

No person after 1st *December* 1730, to act as an attorney, or sue out any writ, or commence, carry on or defend any action, &c. either before or after judgment, in the name of any other person in the king's bench,

Were made by letters patent.

Judges to examine them, &c.

To take the oaths.

If an attorney convicted of forgery, &c. shall practise, judge to transport.

No person to commence any action or defend without being sworn and enrolled in one of the courts.

bench, common pleas, or exchequer, dutchy of *Lancaster*, or in any of the courts of great sessions of *Wales*, or of the counties palatine, or in any other court of record in *England*, where attornies have been accustomedly admitted and sworn, unless such person shall take the oath appointed to be taken, and shall be admitted and inrolled before 1st Dec. 1730, in such of the said courts where he shall act as an attorney, or shall be sworn, admitted and inrolled in the said courts.

2 Geo. 2. c. 23. f. 1.

Any judge before admission to examine if he be qualified; if so, then to administer the oath, &c.

Any one or more of the judges of the said courts respectively, shall, before they admit such person to take the said oath, examine and inquire touching his fitness, &c. and if satisfied that he is qualified, then to administer the oath, and after such oath taken, cause him to be admitted an attorney of such court respectively, and his name to be inrolled as an attorney without fee, except 1s. for the oath: The admission to be written on parchment, and signed by such judge or judges respectively, wherein the usual stamp shall be first impressed and delivered to the person admitted.

Admission,

23 Geo. 3. c. 58.

The like clause respecting solicitors.

f. 3. The stamp now is 8l. in the whole.

The like clause as the first respecting persons soliciting suits in the court of chancery, court of equity, in the exchequer chamber, court of the dutchy of *Lancaster* at *Westminster*, or courts of the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in any inferior court of equity in *England*. Sect. 4.

Sect. 5. The master of the rolls, two of the masters in chancery, the barons of the court of exchequer, the chancellor of the dutchy of *Lancaster*, and the judges of the other courts of equity, or any one or more of them, shall examine before they admit the person to take the oath touching his fitness and capacity to act as a solicitor, &c. and if satisfied, to administer the oath, &c. and cause him to be admitted a solicitor, &c.

None to act unless bound by contract for five years to a sworn attorney.

No person shall be admitted to act as an attorney, or sue out any process or defend any action in the name of any other person, in any of the courts of law aforesaid, unless such person shall have been bound by contract in writing to serve as a clerk for five years, to an attorney duly and legally sworn and admitted in some or one of the said courts, and such person, during the said term of five years, shall have continued in such service; and also unless such person, after the expiration

tion of the said five years, shall be examined, sworn and inrolled, as before required. *Sec. 6.*

The judges before they admit such person, are to enquire touching his fitness and capacity, and if satisfied, are to administer the oath, and cause him to be admitted and inrolled. *f. 7.*

The like with respect to persons who are to be admitted solicitors in the courts of equity. *f. 8 & 9.*

An attorney admitted in any of the said courts of law, or as a solicitor in any of the said courts of chancery, with the consent of any attorney in any of the said other courts, such consent being in writing signed by such attorney, and in the name of such attorney, to sue out any writ, or commence, carry on, prosecute or defend any action, or proceeding in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court. *Sec. 10.*

No attorney shall have more than two clerks at one and the same time, who shall be bound by contract in writing to serve as clerks. *Sec. 15.*

The prothonotaries and the secondary of the king's bench, &c. to have three clerks at the same time, and no more; and such clerks having served *five years*, may be admitted the same as any other clerk. *Sec. 16.*

An attorney of this court may, by the clause of the statute, carry on proceedings in the court of great sessions of *Wales*, in the name of an attorney of that court, and declare for business and fees.

If any sworn attorney of this court shall knowingly and willingly permit or suffer any other person to sue out any writ, or commence or defend any action in his name, not being a sworn attorney, or a sworn solicitor in chancery, &c. and shall be thereof convicted, he shall, from the time of such conviction, be disabled to practise, and his admittance to be void. *Sec. 17.*

The chief clerk of this court is without fee or reward to inroll the name of every person who shall be admitted an attorney, and the time when, in rolls or books, to which all persons shall have recourse without fee or reward. *Sec. 18.*

A sworn attorney of this court may be sworn, admitted, and inrolled, a solicitor in all or any of the courts of equity, without any fee for the oath or any stamp, if the master of the rolls, &c. shall, on examining

Judges to examine.

Solicitors.

An attorney of this court may sue in any other, with consent of an attorney of that court.

Not to have more than two clerks.

Secondary of K. B.

May carry on proceedings in *Wales* by consent.

Sworn attorneys permitting those that are not to issue out writs, disabled from practice.

Attornies to be inrolled.

A sworn attorney may be admitted a solicitor.

mining him, be satisfied that such attorney is duly qualified to be so admitted. *Sect. 20.* A sworn solicitor in one court of equity may be admitted into any other court. *Sect. 21.*

Attorney, &c. in their own name suing out any writ, &c. not inrolled, forfeit 50l.

Any person in his own name, or in the name of any other, suing out any writ, or commencing or defending any action, &c. in any of the courts of law or equity, mentioned in the said act, as attorney or solicitor, in expectation of any gain, fee, or reward, without being admitted, shall forfeit 50l. to the use of the person who shall prosecute, and be made incapable to maintain any action for any fee, reward, or disbursements, on account of prosecuting or defending such action, &c. *Sect. 24.*

Articles cancelled by order of court.

Frazer, an attorney of this court, had taken for his articulated clerk, one *Smith*, a turnkey of the *King's Bench prison*, a full aged man, and who still continued to act as turnkey. It did not appear that any money was paid, or that the master fed, lodged, or entertained the clerk (though the articles covenanted that he should), nor did the clerk officiate for *Frazer*, but in matters relating to the prison. It appeared that *Frazer* had, since these articles (which were dated only two years ago, in 1755), become concerned in 63 causes, on behalf of the prisoners in the gaol. The court were all very clear that these articles were merely collusive, and contrived to secure the business arising from the prisoners, and ordered the articles to be cancelled. *Frazer's case. 1 Burr. 291.*

Quaker.

A quaker having served a clerkship for five years, as before mentioned, to an attorney or solicitor, may be admitted an attorney on his affirmation. *12 Geo. 2. c. 13. s. 18.*

The oath.

I A. B. do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.

So help me God.

No attorney being a prisoner, to commence or prosecute any action.

No attorney who shall be a prisoner in any gaol or prison, or within the limits, rules or liberties of any goal or prison, shall, during his confinement, in his own name, or in the name of any other, sue out any writ or process, or commence or prosecute any action or suit, and all proceedings in such action or suit shall be void and of no effect; and such attorney, so commencing

mencing or prosecuting any action or suit as aforesaid, shall be struck off the roll, and be incapacitated from acting as an attorney for the future. And any attorney permitting or empowering any such attorney as aforesaid, to commence or prosecute any action or suit in his name, shall be struck off the roll, and be incapable of acting as an attorney for the future. *Stat. 12 Geo. 2. c. 13. s. 9.*

Any attorney permitting, &c.

This not to prevent any attorney confined as aforesaid, from carrying on or transacting any suit or suits commenced *before the confinement of such attorney.* *Seet. 14.*

Not to extend to suits before confinement.

After action commenced by an attorney he becomes a prisoner, then the bail-bond is assigned, and he being still a prisoner commences an action on the bail-bond; this has been held in *C. P.* to be a continuance of the original suit commenced before the attorney became a prisoner. *Wheetham v. Needham, Barnes 46.*

May commence an action on a bail-bond.

It has also been held that the above act relates only to *prosecuting*, and not to the *defending of suits.* *Longman v. Rogers, Barnes 263.*

Relates to prosecution.

Persons bound *clerks to attornies, or solicitors*, are to cause *affidavits* to be made and filed of the execution of the articles within *three months next after the date thereof*; and in every such affidavit shall be specified the *names of every such attorney and solicitor*, and of *every such person so bound*, and their places of abode respectively, together with the *day of the date of such articles*; and every such affidavit shall be *filed within the time aforesaid*, in the court where the attorney or solicitor to whom every such person respectively shall be bound as aforesaid, hath been inrolled as an attorney or solicitor with the proper officer; and none to be admitted before such affidavit be produced and read in court. *22 Geo. 2. c. 46. s. 3, 4.*

Persons bound to serve as clerks to attornies to cause affidavit to be made within three months after execution of contract.

In this court the secondary or his clerk shall be the proper officer for filing such affidavits, *seet. 5*; and shall keep a book, wherein shall be entered *the substance of such affidavit, specifying the names and places of abode of every such attorney and clerk, and of the person making such affidavit, with the date of the contract, and the days of making and filing such affidavit*; and may take, at the time of filing such affidavit, *2s. 6d.* for his trouble; which books may be searched gratis. *Seet. 6.*

None to be admitted before such affidavit produced.

Who are to file such affidavits. Books to be kept, &c.

No

No attorney to take a clerk after discontinuing business.

No attorney shall have, take, or retain any clerk, who shall become bound by contract in writing as aforesaid, after such attorney shall have discontinued or left off, or during such time as he shall not actually practise or carry on the business of an attorney. *Sect. 7.*

Clerk to be employed the whole time.

Every person who shall become bound, &c. shall, during the *whole time or term* of service, to be specified in such articles, *continue and be actually employed by such attorney or solicitor, or his or their agent or agents*, in the proper business, practice, or employment of an attorney or solicitor. *Sect. 8.*

If, before the expiration of the time, the attorney die, &c. or the clerk be discharged by, &c.

Provided if any such attorney, to or with whom any such person shall be so bound, shall happen to die before the expiration of such term, or discontinue or leave off his practice, or if such contract shall, by mutual consent of the parties, be cancelled, or such clerk shall be legally discharged by rule of the court, before the expiration of such term; and the said clerk shall, in any of the said cases, be bound by another contract or contracts in writing to serve, and shall accordingly serve in manner before mentioned, as clerk to any other such practising attorney or attorneys as aforesaid, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term to the same person to whom he was originally bound, *so as affidavit be duly made and filed of the execution of such second contract or contracts, within the time and in like manner as is before directed, concerning such original contract.* *Sect. 9.*

and be bound to serve for the remainder of the time;

such service to be good, if affidavit be made and filed, &c.

Before admittance of an attorney, affidavit to be made and filed of actual service.

Every person who shall become bound as a clerk as aforesaid, shall, before he be admitted an attorney, cause an affidavit of himself, or such attorney to whom he was bound as aforesaid, to be duly made and filed with the officer before appointed, that he *hath actually and really served and been employed by such practising attorney, to whom he was bound as aforesaid, or his agent, during the said whole term of five years.* *f. 10.*

Duties to be paid,

There shall be paid the duty of 6d. for every 20s. for 50l. or under;—and 1s. for every 20s. above 50l. by the master. *8 Ann. c. 9. f. 32.* which lies on the master.

and at what time.

The duties to be paid if in *London* or *within the weekly bills*, within *one month* after the date. *f. 36.* And elsewhere

elsewhere shall be brought either to the head office, or to a collector residing without the bills in *England, Wales*, or the town of *Berwick upon Tweed*, within *two months after date and execution*, and if paid to the receiver-general in the *head office London*, the articles to be immediately stamped. But if the duties be paid to a collector without the bills, he is to indorse it on the indenture and subscribe his name, and deliver it back to the bringer. *f. 37.* And by *sect. 38.* such indenture so indorsed, with the duties paid, if executed within *fifty miles of London*, shall be sent to the head office in *three months after the date*; if executed above *fifty miles*, in *six months*, to be stamped, otherwise to be void.

There used to be an indemnity act pass for not paying the duties within the time limited, but no act of this sort has passed since *9 Geo. 3. c. 37.* Vide *18 Geo. 2. c. 22.* *20 Geo. 2. c. 45.* *5 Geo. 3. c. 4. f. 19.* how clerks are to act if duties be not paid by masters.

If any sworn attorney shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof, in a summary way to the court from whence such process did issue, and proof made thereof upon oath to the satisfaction of the court, that such sworn attorney had offended therein as aforesaid, then every such attorney so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said court, to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year. *f. 11.*

No person shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace, either with respect to matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly inrolled pursuant

Attorney acting as agent, or permitting his name to be used, or sending any process to any unqualified person, thereby to enable him to appear or act as an attorney, to be struck off the roll.

None but attorneys admitted to practise at general or quarter sessions.

§ Burr. 2660.

pursuant to *stat. 2 Geo. 2. c. 23.*; or be hereafter admitted an attorney, and inrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and inrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if any attorney shall permit any person, not being admitted and inrolled as aforesaid, to make use of his name in the courts of general or quarter sessions as aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Sect. 12.*

Persons exempted.

Provided that nothing herein contained shall extend to deprive the attornies of the dutchy of *Lancaster*, or of the courts of *great sessions* in *Wales*, or of the *counties palatine* of *Chester*, *Lancaster*, and *Durham*, from acting within their respective jurisdictions. *Sect. 13.*

Attorney not attending, to have no privilege.

An attorney that has not been attending his employment in this court by the space of *one year*, unless hindered by sickness, shall not be allowed his privilege of an attorney. *R. M. 1654. Sect. 1.*

Attornies dismissed.

Attornies dismissed by one court from their practice for misdemeanor, be not (after certificate) admitted to practise in another court, it being contrary to the intent of the law. *Ibid.*

When he is entitled to privilege.

It seems that if an attorney remains of record, he is still entitled to privilege, *Lutw. 1667.* although he does not alledge in his plea that he has any clients, or prosecutes or defends any causes at the time of the action being brought against him. *Vide* the above rule.

No attorney to be lessee in an ejectment, nor bail for a defendant in this court. *R. Mich. 1654.*

Not to change attorney without leave of the court.

No person, without rule of court, or order of a judge, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *R. Mich. 1654. Doug. 217. Say. 218. Black. 8.*

This court will not permit an attorney to be changed in a cause, and another attorney appointed in his stead, till his bill of fees and disbursements be settled and paid. 12 *Mod.* 440. 8 *Mod.* 306.

Nor till the former bill be paid.

Where the attorney for the plaintiff or defendant dies, pending the suit, and the party whose attorney is dead, will not retain another attorney, the cause against him may proceed, and is not bound to hinder his client's cause. *Sty. Pract. Reg.* 13.

Where the attorney dies.

The authority of an attorney continues until judgment (where no order has been obtained to remove him), and for a year and a day afterwards to sue out execution, and for a longer time if the party continues in execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by *scire facias*, or an action of debt on the judgment. *Comb.* 40. *Sty.* 426. And then a new authority is necessary. *Salk.* 86.

How long the authority continues.

An attorney is not compellable to appear for any one, unless he undertake so to do; if he undertake, and does not file the appearance, upon summons before a judge he shall be compelled, or by motion. 6 *Mod.* 86. *Str.* 693. 12 *Mod.* 255. He is bound if for an infant. *Str.* 114.

Not compellable to appear, but if he undertakes must.

Friday next after the octave of the purification of the Blessed Virgin Mary, in the 8th year of king George the third.

H. T. 1768.

Whereas the habitations of many attornies practising in this court, resident in and near the cities of London and Westminster, are often very difficult to be found, whereby it is impracticable to serve them with notices, summonses, orders, and rules, to the great delay of the proceedings in this court: For remedy whereof for the future, It is ordered, That the master shall forthwith cause to be prepared a proper alphabetical book for the purposes after mentioned, and that the same shall be publicly kept at the master's office in the King's Bench Walks, there to be inspected by any attorney, or his clerk, without fee or reward. And that every attorney practising in this court, and residing in London or Westminster, or within ten miles of the same, shall, before the first day of the next term, enter in such book (in alphabetical order) his name and place of abode, or some other proper place within the cities of London or Westminster,

Rule respecting attornies entering their names in the book, and where notices, &c. are to be served.

ster, where he may be served with such notices, summonses, orders, and rules. And every attorney afterwards to be admitted, and practising and residing, as aforesaid, shall upon his admission make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be so served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book. And that all notices, summonses, orders, and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book, with any person resident at, or belonging to such place. And if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney in the said master's office, shall be deemed a sufficient service, unless the matter shall be such as requires a personal service. And it is further ordered, that a copy of this rule shall be publicly fixed up in the said master's office, and that another copy thereof shall also be fixed up in the chambers of each of the judges of this court.

N. B. It is expected that such practisers who live remote from the *Temple*, shall add to the place of their abode, where, and with whom, notices, summonses, orders, rules, and other proceedings that do not require personal service, may be left near any of the inns of court, or chancery.

As many attornies have no certain place of residence, any *place*, where he may be served, though not in his actual place of abode, is sufficient. But when the name and place of abode is entered, then service at that place is the proper service. *Loft. Rep. 357.*

By stat. 25 Geo. 3. c. 80. After the first of November 1785, there shall be raised and levied the rates and duties following: That every solicitor, attorney, notary, proctor, agent, or procurator, admitted, inrolled, or registered in any of his majesty's courts at *Westminster*, or in any ecclesiastical court, or in any of the courts of admiralty or cinque ports, or in any of his majesty's courts in *Scotland*, the great sessions in *Wales*, or in any courts in the counties palatine, or in any other court in *Great Britain*, holding pleas, where the debt or damage shall amount to 40s. or more, shall,

previous

Certificates to be taken out annually by every solicitor practising in any court, holding pleas for 40s. and upwards.

previous to his commencing or defending any suit or prosecution, take out annually a certificate of such his admission, inrolment, or register: That for and upon every such certificate so taken out by any solicitor, &c. who shall reside in any of the inns of court, or in the cities of *London* or *Westminster*, the borough of *Southwark*, the parish of *Saint Pancras*, and *Saint Mary le Bone*, or within the bills of mortality, or within the city of *Edinburgh*, there shall be charged a stamp duty of 5*l.* and in any other part of *Great Britain*, 3*l.*

After the first of *November* 1785, every person admitted, sworn, inrolled, or registered a solicitor, attorney, &c. in any one or more of the courts aforesaid, who shall commence, carry on, or defend any action, suit, or prosecution therein, shall annually, during such time as he shall continue so to practise therein, deliver in to some one of the courts in which he shall have been admitted, sworn, inrolled, or registered, in such manner as is herein-after directed, a paper or note, in the proper hand-writing of every such solicitor, &c. containing his name and usual place of residence, and marked and stamped with the proper mark or stamp, denoting the duty herein-before imposed upon certificates, according to the place of such his residence as aforesaid; and thereupon every such solicitor, &c. shall be entitled to have a certificate (if the same shall be required) in the manner herein-after directed. *f. 3.*

The chief clerk of the king's bench, or his deputy, the clerk of the warrants in the court of common pleas, or his deputy, the clerk of the pleas in the exchequer office of pleas, or his deputy, the prothonotaries of the respective counties palatine of *Lancaster*, *Chester*, and *Durham*, and of the great sessions in *Wales*, or their respective deputies, and such officers of the inferior courts of law as the judge or judges of the inferior courts respectively shall appoint, the senior clerk of the petty bag office in the court of chancery, or his deputy, the king's remembrancer of the court of exchequer, or his deputy, the chief clerk of the duchy chamber of *Lancaster*, or his deputy, the register of the respective courts of equity in the said counties palatine, and of the great sessions in *Wales*, or his deputies, shall, and they are hereby required, from time to time,

Those residing in *London* and *Westminster*, the bills of mortality, or *Edinburgh*, to pay 5*l.* for a certificate; any other part, 3*l.*

From Nov. 1785, every acting solicitor, &c. shall annually deliver in a note of his name and residence, &c. in order to obtain a certificate.

Officers for entering applications for certificates in *England*.

Entering officers
to certify notes
delivered.

upon payment of 1s. to enter the name and place of residence of such attorney, &c. and who shall have delivered in such paper or note in writing, duly stamped, and required a certificate of his inrolment as expressed, in rolls or books to be provided and kept for that purpose in the said several and respective offices: and such officers shall subscribe to every such paper or note in writing, so delivered in, a certificate signed by every such officer respectively, according to the form of the schedule annexed; to all which said rolls or books, in the said courts respectively, all persons shall and may, at all seasonable times, have free access, without fee or reward. *f. 4.*

Entering officers,
&c. to issue an-
nual certificates,
which must be
renewed ten
days before
expiration.

Every certificate shall bear date on the day on which the same was issued, and shall endure and remain in force for the space of twelve calendar months, to commence from the first of *November 1785*, upon all certificates to be issued on or before that day, and upon certificates to be first issued to any person or persons, after the said first day of *November 1785*, to commence from the date of every such certificate; which said certificate shall be renewed at least ten days previous to the expiration of the time for which it was granted, and so yearly and every year, so long as such solicitor, &c. shall continue to practise in any such court in manner as aforesaid. *f. 5.*

Persons residing
forty days in a
year within the
limits of the
higher duties,
are to pay the
same.

Persons residing in any of the *inns of court*, or in the cities of *London* or *Westminster*, or the borough of *Southwark*, the parish of *Saint Pancras*, or *Saint Mary le Bone*, or within the *bills of mortality*, or within the *city of Edinburgh*, for the space of *forty days*, or more, in any one year, every such solicitor, &c. shall be deemed to be resident within the limits of the different districts, and shall be liable to the higher duties imposed on certificates, notwithstanding such solicitor, &c. shall or may at other times in each such year, reside elsewhere without the limits last mentioned. *f. 6.*

Penalty on act-
ing without
certificate, or
giving in a false
place of resi-
dence.

Penalty of 50l. on every person who shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings as a solicitor, &c. in any of the courts aforesaid, for or in respect of any gain, fee, or reward, without having obtained such certificate, or shall deliver in to the respective officers appointed, any false or fictitious place

place of residence, with intent to evade the payment of the higher duties; and made incapable to maintain or prosecute any action in any court of law or equity, for the recovery of any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. *f. 7.*

Any person having duly obtained a certificate, may sue or defend any action in the name and by consent of any other solicitor, &c. of such court in writing first had and obtained, and signed by him in like manner as he might have lawfully done before this act, provided such solicitor, &c. in whose name such proceedings shall be instituted, commenced, or carried on, shall also have first duly obtained a certificate out of the court wherein he is sworn, &c. in manner as herein-before is directed; or in default thereof, every such solicitor, &c. shall be liable to the like penalties, &c. as any other solicitor is by this act made subject and liable to. *f. 8.*

It shall and may be lawful for any person duly sworn, admitted, &c. a solicitor, &c. in any two or more of the said courts respectively, under a proper certificate obtained from either of the said courts respectively, to commence or defend any action or suit in any of the said other courts in which he is so sworn, &c. although such certificate shall or may not have issued from such other court. *f. 9.*

Where country attornies are concerned, declarations, pleas, and other proceedings, should not be delivered and carried on in the country, but by the agents in town.

If the agent of the plaintiff's attorney gives the agent for the defendant time to plead, the country attorney, cannot sign judgment till that time be expired.

Notice of trial must be given in town; but a countermand may be given in the country.

"That no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the king's courts, during the time that he is in office with any such sheriff." *Stat. 1 H. 5. c. 4.*

Attornies are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill-practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the

Persons having taken out certificates, may act for others who have also taken them out.

Person under one certificate may act in any other court in which he is sworn, &c.

Where country attornies are concerned, pleadings to be delivered to the agents.

Time to plead.

Notice of trial.

No under-sheriff or clerk, &c.

Attornies liable to be punished in a summary way.

court will not easily be prevailed on to proceed in this manner, if it appears, that the matter complained of was rather owing to neglect or accident, than design; or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251. 318. 440. 583. 657. 4 *Mod.* 367.

Also for base and unfair dealings.

They are also liable to be punished for base and unfair dealings towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their clients writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such like gross and palpable abuse. 2 *Haw. Pl. of the Cr.* 144. 8 *Mod.* 306. 12 *Mod.* 516.

Name set without authority.

An attorney's name to the process being set thereto without his authority, proceedings were set aside. *Oppenheim, qui tam, v. Harrison*, 1 *Burr.* 20.

Cannot be bail except in criminal cases.

An attorney cannot be bail. *Dougl.* 466. Nor his clerk, 467. But in a criminal case, attorney for defendant may. *Rex v. Bowes*, *ibid.*

Cannot be lessee. Constable.

An attorney cannot be lessee in ejectment. *Dougl.* 466. An attorney is not compellable to serve as constable. *Dougl.* 358.

Payment.

Payment to the attorney is payment to the principal. *Dougl.* 623. 1 *Black. Rep.* 8. *Pawel v. Little*.

Payment to an agent.

Payment of the debt to an agent employed to sue the defendant by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney himself is. *Yates v. Freckleson*. *Dougl.* 623.

An action lies for not charging in execution.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence, 3 *Wils.* 325.; but the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

May detain writings, &c. until paid.

An attorney or solicitor, having fees due to him, may detain writings until his just fees are paid; but if there are none due to him, the court, on motion, will compel the delivery of them, 1 *Lill.* 148.; but he cannot detain writings, which are delivered upon special trust, for the money due to him in that very business. *Mod. Caf. L. and Eq.* 306.

When may detain.

If

If a man hath a joint cause of action against two, one an attorney, and the other not, he must arrest both, and declare against them as in custody of the marshal. 2 Salk. 544. 2 Lev. 129.

When an attorney may be arrested.

Attorney's Lien for Costs.

An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu*, if he can lay hold of it; if he apply to the court, they will prevent its being paid over till his demand is satisfied. If the attorney gave notice to the defendant not to pay till his bill be discharged, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. *Welsh v. Hole*, Dougl. 238.

An attorney has a lien on the money recovered for his bill of costs.

A verdict was given for 20l. and error brought; the plaintiff compromised with defendant for ten guineas for the debt and costs (after he had been in gaol for two years); a motion was made for a rule to shew cause why the defendant should not pay the plaintiff's attorney's bill; but it was discharged, because the application went to the extent of controverting the validity of a payment of the whole debt and costs to a plaintiff without the privity of his attorney; and it would be too much to say that a defendant shall not transact the business of a cause with the plaintiff himself, in a case where there has been no notice not to do so from the attorney, either express or implied. *Dougl. Rep. 238. Welsh v. Hole*.

If notice is given not to pay the costs to the client, &c.

The master awarded a certain sum to be paid to the plaintiff with costs, which plaintiff threatened to take execution for, unless paid. The defendant's attorneys, after notice from plaintiff's attorneys not to pay it, because their bill was not satisfied, paid the whole to the plaintiff himself. Plaintiff's attorneys applied for and obtained a rule to shew cause why it should not be referred to the master, to see what lien the plaintiff's attorneys had upon the debt and costs recovered in this action, as against plaintiff himself, and why defendant's attorneys should not pay over that sum to the plaintiff's attorneys. *Lord Kenyon*: The principle by which *this* application is to be decided was settled long ago, namely, *that the party should not run*

If defendant's attorney pay the plaintiff the debt and costs after notice not to do so till he has been satisfied first, the former is liable to pay over again to the latter the amount of his lien on such debt and costs of the suit.

away with the fruits of the cause, without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expence, those fruits are obtained. If the money had been paid over *before notice of his lien*, it would have been good; but here the payment was made in violation of the notice. *Read v. Dupper*, 6 Term Rep. 361. *Rule absolute.*

In *Welch v. Hole*, Lord Mansfield compared this to the case of an assignment of a chose in action, which indeed in legal strictness cannot be done; but still, according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice. Vide *Mitchell v. Oldfield*, 4 Term Rep. 124. 3 Atk. 720. *Turwin v. Gibson*, Doug. 3d ed. 238. *Griffin v. Eyles*, 1 H. Black. Rep. 122.

If *A.* recover against *C.*, and *C.* recover against *A.* and *B.*, the court will permit *C.* on motion to set off the damages which he has recovered against those obtained by *A.* on his undertaking that the bill of *A.*'s attorney in the first action shall be satisfied, he having a lien on the judgment for his costs.

Attorney ordered to pay costs.

If an attorney has been struck off the roll and called to the bar.

Attornies, and *solicitors*, have a lien on all papers in their hands, and judgments recovered for their costs; and in chancery they are entitled to retain title-deeds for that purpose. In this action the plaintiff recovered a judgment against the defendant for 182l. 10s. The defendant having also recovered in another action against this plaintiff and another; on a rule to shew cause *why the debt and costs in the latter should not be set off against the judgment in the former action*, the court held it right that the attorney in this case, should be satisfied for his costs before the defendant was allowed to make the set-off. And *Buller, J.* said, when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attornies bill is satisfied. *Rule absolute*, on defendant *undertaking to pay the bill, and on his entering a remittitur in the cause in which this defendant was plaintiff.* *Mitchell v. Oldfield*, 4 Term Rep. 124.

An attorney was ordered to pay costs (as well as his client), having joined in an affidavit to support a frivolous complaint, and made resentful declarations which shewed him to be personally active in it. 2 Burr. 654. *Rex v. Fielding, Esq.*

If an attorney has been struck off the roll (although at his own request) and called to the bar, the court will not permit him to be put on again; at least not unless he hath been disbarred upon application for that purpose to the inn of court where he was called: *Ex parte Cole*, Doug. 113. *ost. ed.*

The

The court will lay an attorney who has been struck off the roll at his own instance, and applies to be restored, under the terms of taking no advantage of his privilege in any action then depending. *Dougl.* 114.

If he be struck off at his own instance.

An attorney was fined 500*l.* for taking 200*l.* of a person charged with forgery, to let him out of custody of the tipstaff. *Rex v. Vaughan*, 1 *Wils.* 22.

Attorney fined.

An attorney of this court was arrested by a latitat, and it was held that it is a motion of course to discharge him out of custody, on finding common bail. *Wheeler's case*, 1 *Wils.* 298.

Arrested by latitat.

But if an attorney of the C. B. is arrested by latitat, he must plead his privilege. *Snee v. Humphreys*, one, &c. 1 *Wils.* 306.

When must plead his privilege.

An attorney convicted of felony was struck off the roll as being an unfit person to practise. *Cow. Rep.* 829. The conviction was five years preceding the application, and *no misconduct* imputed to him.

An attorney convicted of felony struck off.

The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. *Hughes v. Mayor*, 3 *Term Rep.* 275.

Court will oblige him to deliver up deeds.

It is ordered, from and after the first day of next Easter term, on every appointment to be made by the master, the party on whom the same shall be served and required to attend, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment. *Rule, Hil. 32 Geo. 3.*

Attornies to attend the first appointment.

They are to be governed by the master, and to attend him on notice; *R. Hil. 15 Car. 2.* may file bills and declarations, paying two shillings a term, and examine the files *gratis*. *Mich. 15 Car. 2. reg. 3.*

To be governed by the master.

In all disputes concerning attornies, clerks, and their articles, or money given with them, the court exercise an equitable jurisdiction, upon motion, and appoint a restitution on the death of the master, or clerk, of part of the money given, according to the time actually served. 2 *Keb.* 38.

In all disputes respecting masters and clerks, court to exercise a jurisdiction.

As to giving Evidence.

Not bound to discover and give in evidence the contents of a deed shewn by his client, nor any instructions

Not bound to discover.

Attorney when
restrained from
giving evidence
or not.

When may be
examined,

When not.

structions given him by his client, nor can he be forced to act against his will.

He is not restrained from giving evidence of a conversation between him and his client, touching the justice of his suit, after inquiry executed, or judgment by default, and a *compromise thereupon*. *Cobden v. Kendrick*, 4 Term Rep. 431. The difference is, whether the communication were made by the client to his attorney in confidence, as instructions for conducting his cause, or a mere *gratis dictum*. The privilege is confined to the cases of counsel, solicitor, and attorney; but in order to *raise the privilege*, it must be proved, that the information, which the adverse party wishes to learn, was communicated to the witness in *one of those characters*; for if he be employed merely as a *steward*, he may be examined. *Per Buller, J.* 4 Term Rep. 759. *Wilson v. Rastall*.

But he is not privileged from giving evidence of collateral facts. *Cowp. Rep.* 846. *Doe v. Andrews*. If he attests any instrument, he is bound to prove its execution. He is obliged to prove his client having sworn and signed an answer, upon which the latter is indicted for perjury. *Ibid. Bull.* 284. For that is not communicated to him by his client professionally, but a *fact* which he might *know of his own knowledge*. *Contra 2 Str.* 1122. *Rex v. Watkinson*.

Trinity Term, 31 Geo. 3.

New rule re-
specting clerks,
and their future
admission.

It is ordered, that from and after the last day of *Michaelmas* term next ensuing, no attorney who shall be retained or employed as a writer or clerk by any other attorney shall, during the time of such employ, take or have any clerk under articles; and that no service to any such attorneys under articles, during the time that such attorney shall be so employed by any other attorney, shall be deemed good service^a:

and

The exposition
of the first part
of the rule.

21 Geo. 2. c. 46.
s. 7.

^a *Mr. Baldwin*, after adverting to the above rule, desired the opinion of the court upon the subject of an attornied clerk who had served an attorney for three years, *who was a clerk to another attorney*, whether the rule in question was intended to have a *retrospective operation* with respect to services *already performed*, or merely to *such as were to commence from the present Michaelmas term*. The former construction would press hard upon individuals who had already served a great part of their time in this manner, under a general persuasion, *warranted by the common practice*, that *such service* was valid. The court said, that the rule, which was only made in conformity to, and in furtherance of the act of parliament, could not be

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32 Geo.

ATTORNIES.

75

and it is further ordered, that from and after the same last day of *Michaelmas* term, no person who shall enter into articles with an attorney or attornies shall be at liberty to serve the agent or agents of such attorney or attornies under such articles for a longer time than any one year of his clerkship; and that any such service to an agent or agents beyond that time, shall not be deemed good service. And to the intent that better information may be obtained touching the fitness and qualifications of persons applying to be admitted attornies, it is further ordered, that, from and after the said last day of *Michaelmas* term, every person who shall intend to apply for admission as an attorney in this court, and who shall not have been admitted an attorney or solicitor of any other court, shall for the space of one full term, previous to the term in which such person shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode, of the attorney or attornies to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the court of king's bench, in such places as publick notices are usually affixed^b; and also in some conspicuous place in the chambers of each of the judges of this court, and in the king's bench office: and that no person who shall not have regularly complied with this order, shall in future be admitted an attorney of this court.

Service with the agent.

^b Vide the next rule.

By the Court.

Whereas, by a rule made by this court in *Trinity* term in the 31st year of his present majesty, It was ordered, (amongst other things,) that every person who should after the then next *Michaelmas* term intend to apply for admission as an attorney in this court, should, for the space of one full term previous to the term in which such person should apply to be admitted, cause his name and place of abode, and also the name or names, or place or places of abode of the attorney or attornies to whom he should have been articulated, written in legible characters, to be affixed on the outside of the court of king's bench, and

New rule respecting attornies. *Trin. term* 33 Geo. 3.

be limited in restraint of future services of this nature only; for the mischief intended, was the admission of improper persons as attornies; which required as much to be prevented now, as at any future time; and no hardship could be complained of, as the rule was not introductive of any new regulation, but confirmatory of an old one. 4 Term Rep. 492. *Mic.* 32 Geo. 3.

also

Instead of fixing up notices, to enter name and place, &c. in a book at each of the judges chambers,

also in some conspicuous place in the chambers of each of the judges of this court, and in the king's bench office, and that no person who should not have complied with this order, should in future be admitted an attorney of this court. *And whereas*, inconveniences have arisen by the above practice, to remedy the same, *It is hereby ordered*, that every person who shall, after the expiration of this term, intend to apply as above stated, shall comply with the above in part recited rule, (except as to fixing up his name and place of abode in the judges chambers,) and shall instead thereof, for the space of one full term, previous to the term in which such person shall apply to be admitted, enter, or cause to be entered, in a book to be kept for that purpose, at each of the judges chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attornies to whom he shall have been articulated: and that no person who shall not have complied with this rule, shall in future be admitted an attorney. *By the Court.*

The notice must be entered the day before the first day of the term, and so must the notices be stuck up.

The form of the notice.

Notice is hereby given, that A. B. of, &c. now under articles of clerkship to C. D. of, &c. attorney at law, intends to apply next Trinity term to be admitted an attorney of his majesty's court of king's bench. Dated this 12th day of May 1796.

After Feb. 5, 1794, within the bills of mortality, and Feb. 10 in any other part of England, the following stamp duties to be paid.

By stat. 34 Geo. 3. c. 14. Within the bills of mortality, from and after Feb. 5, 1794, and in every other part of England and Wales, after Feb. 10, 1794, there shall be raised, &c. for and in respect of every contract in writing made after the 5th and 10th of Feb. 1794 respectively, whereby any person shall become bound to serve as a clerk in order to his admission as a solicitor, or attorney, in any of the courts of law or equity, in pursuance of the laws now in force for regulation of solicitors and attornies, the new and additional rates and duties following, over and above all other rates, &c. payable by law, upon or in respect of the same, (that is to say,) For and upon every piece of vellum or parchment, or sheet or piece of paper, on which shall be ingrossed, printed, or written, any such contract made, whereby any person is or shall become bound to serve as a clerk as aforesaid, in order to his admission as a solicitor or attorney, in any of his majesty's courts at Westminster, there shall be charged a stamp duty of 100l.

For every contract to serve as a clerk in any court at Westminster.

And

And in order to his admission as a solicitor or attorney in any of the courts of great sessions in *Wales*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, or in any court of record in *England* holding pleas, to the amount of 40s., and not in any of the said courts at *Westminster*, there shall be charged a stamp duty of 50l. *s. 1.*

And no person who is or shall be bound to serve as a clerk after the said days, shall be admitted to be a solicitor or attorney, unless the indenture or other writing containing such contract, stamped according to this act, shall be inrolled or registered with the proper officer of the court, to be appointed for that purpose, in the court wherein such person shall propose to be afterwards admitted a solicitor or attorney by virtue of his service under such contract, together with an affidavit of the time of the execution of such contract by such clerk; and in case the same shall not be so inrolled or registered within six months after execution thereof, together with such affidavit of the time of the execution of such contract, then the service of such clerk, under such indenture or writing, shall be deemed to commence from the time of such inrollment, or registry, only, and not from the execution of such indenture or writing. *s. 2.*

That every person to be admitted a solicitor, or attorney, in any of the said courts by virtue of any such contract made after the 5th and 10th of *Feb. 1794* respectively, and service under the same, before he shall be permitted to practise as a solicitor or attorney in such court, or to be inrolled or registered therein, shall make an affidavit of the due payment of the duty imposed, and shall assert in such affidavit the sum paid in respect thereof, and shall also specify the name and place of abode of the person, &c. with whom such contract of service was entered into, the time of the execution thereof, and the time of inrolling or registering the same; and in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit the court in which he has been so admitted, and the time of his admission therein; and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor, or attorney, with the proper officer (for receiving such affidavits); and every such affidavit shall be produced and read in the court in which such person shall be admitted a solicitor or attorney,

Great sessions of *Wales*, &c. holding pleas, where the debt shall amount to 40s. 50l.

No such clerk shall be admitted unless the indenture be inrolled with an affidavit within six months, &c.

Every such clerk, previous to his being permitted to practise, shall make an affidavit of the payment of the duty, &c.

ney, before he shall be inrolled or registered therein.

f. 3.

If any person not admitted in one of the courts of great sessions, &c. by virtue of a contract prior to the days before mentioned, shall in his own, or another name, sue out any writ, &c. in the courts at Westminster, without being admitted in one of them, forfeit 100l.

That in case any person other than such person who shall have been admitted an attorney or solicitor in one of the courts of great sessions in *Wales, Chester, Lancaster, or Durham*, or other courts of record in *England*, where attornies have been customarily admitted by virtue of a contract made before the 5th and 10th of *Feb. 1794*, and a service in pursuance, or who shall have been admitted a solicitor in one of the said courts of great sessions, or of the said counties palatine, or some other inferior court of equity in *England*, by virtue of a like contract and service according to the directions of the several acts, shall, in his own name, or in the name of any other person, sue out any writ or process, or prosecute or defend any suit, in any of the courts at *Westminster*, for or in expectation of any gain, &c. without being admitted and inrolled an attorney or solicitor in one of the said courts at *Westminster*, such person, &c. shall forfeit 100l. with full costs; one moiety to the king, the other to the informer, to be recovered by action of debt, bill, plaint, suit, or information, in any of the courts of record at *Westminster*, wherein no protection, wager of law, nor more than one imparlance shall be allowed: and such person is hereby also made incapable to maintain or prosecute any action or suit in any court of law or equity, for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. f. 4.

Persons admitted in any court at Westminster, who shall have paid the 100l., may be admitted in any other court without further duty.

That any person who shall have been admitted in any court at *Westminster* by virtue of such contract, and shall have paid the duty of 100l., may be admitted in all or any of the courts before mentioned, without payment of any further duty. f. 5. Subject to all, and every the provisions prescribed by law with relation to the admission of solicitors and attornies in such courts respectively, before the passing this act.

As also persons admitted in any court of great sessions, &c. who shall have paid the duty of 50l. (except the courts at Westminster).

Also that any person who shall be admitted in any of the courts of *great sessions*, or *counties palatine*, or in any *inferior court*, by virtue of such contract, and who shall have paid the duty of 50l. may be admitted in all or any of the courts aforesaid, (except the courts at *Westminster*,) without payment of any further duty. f. 6. Subject to the like regulations.

That

ATTORNIES.

29

That any person who shall have been admitted a solicitor, or attorney, in any of courts aforesaid, by virtue of any contract *bona fide* made, and of his service under the same, actually commenced before the 5th and 10th of Feb. 1794, may be admitted a solicitor, or attorney, in all or any other of the courts aforesaid, without payment of any stamp duty by this act imposed, in such manner, and subject to such regulations as he might have been admitted therein before this act. *f. 7.*

If any person having been articulated to any attorney or solicitor for five years, and having duly paid the duty by this act imposed, (*in case such articles shall have been entered into after the 5th or 10th of Feb. 1794 respectively,*) shall, on the event of such attorney or solicitor dying, or leaving off his practice, or of such articles being cancelled, or discharged, or on any other event, before the expiration of such term of five years, enter into any subsequent contract with any other attorney or solicitor, to serve him as his clerk, for the residue of the said five years, such last contract shall not be subject to or chargeable with any of the duties by this act imposed. *f. 8.*

That all vellum, &c. liable to said duties, shall, before same be ingrossed, be brought to the office and duly stamped. *f. 10.*

But when any such contract shall be made by indentures of different parts, it shall be sufficient to stamp one part only, and the commissioners shall provide one other stamp to be put on the duplicate, which shall not have been so stamped, and cause such other part to be stamped, on sufficient proof being made to their satisfaction of the payment of the duties at any time after the execution, which stamp is to be distinguishable from any other stamp used by them by virtue of this or any other act: and every such other part stamped as aforesaid, shall be as available in the law, and of the like force, as if same had been stamped before the ingrossing, &c. *f. 11.*

The usual allowance is to be made on present payment, as by any former law. *f. 12.*

The powers of former acts relative to stamp duties to extend to this act. *f. 15.*

W. T. of the Inner Temple, London, gentleman, maketh oath and faith, That by articles of agreement, bearing date the day of last past, made between

Persons admitted in any of the courts aforesaid by virtue of contracts made prior to the days before mentioned, may be admitted in any other of them without further duty.

Articled clerks having paid the duty, shall not be subject to any duty for new contracts with other masters.

Contracts before ingrossed to be stamped.

But only one part need be then stamped, and the duplicate shall be stamped after execution, on proof of payment of duty.

Usual allowance.

Affidavit of due execution of articles.

That

between *J. L.* of the *Inner Temple, London*, gentleman; one of the attornies of the court of *king's bench*, of the first part, *L. M.* of in the county of *Middlesex*, of the second part, and *A. M.* of the same place, widow, of the third part, the said *L. M.* for the consideration therein mentioned, did put out, bind out, and place himself to be a clerk to the said *J. L.* and with him, after the manner of a clerk, to serve from the day of the date of the said articles, for the full term and time of five years from thence next ensuing, and fully to be complete and ended, in the profession and practice of an attorney and solicitor, and which said articles were in due form of law executed by the said *J. L. L. M.* and *A. M.* in the presence of this deponent, and *J. B.* of in the county of gentleman, and that the names *W. T.* and *J. B.* set and subscribed as witnesses to the due execution thereof, are of the proper hand-writing of this deponent and the said *J. B.*

Affidavit of service of articles, and notice affixed and entered pursuant to the new rule.

This affidavit will be altered for those serving under the new stat. 34 Geo. 3.

A. B. of, &c. gentleman, maketh oath and saith, That he hath really and truly served and been employed by *C. D.* of, &c. gentleman, as his clerk, in the practice of an attorney and solicitor, for the full term of five years, pursuant to the articles hereto annexed; and this deponent further saith, That he did, previous to last *Hilary* term, affix the name and place of abode of him this deponent, and also the name and place of abode of the said *C. D.* his master in the *king's bench* office, and on the outside of the court of *king's bench* in *Westminster-hall*; and that he did also, previous to the same term, likewise enter his name and place of abode, as well as the name and place of abode of the said *C. D.* in the book kept for that purpose at the chambers of each of the judges of his majesty's court of *king's bench*.

Circuit.

The court of assize.

THE courts of assize, and *nisi prius*, are composed of two or more commissioners, who are twice in every year sent, by the king's special commission, all round the kingdom (except *London* and *Middlesex*, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts, and except the four northern counties, where

where the assizes are taken only once a year) to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of *Westminster-hall*. They came into use in the room of the ancient justices in eyre, who made their circuit once in seven years, for the purpose of trying causes. *Co. Litt.* 293. See *Mag. Chart.* 12.

The present justices of assize, and *nisi prius*, are derived from the statute of *Westm.* 2. 13 *Ed.* 1. c. 30. 14 *Ed.* 3. c. 16. and must be two of the king's justices, of the one bench or the other; or the chief baron of the Exchequer, or the king's serjeants sworn; they usually make their circuit in the respective vacations of *Hilary* and *Trinity* terms. 3 *Ed.* 1. c. 51.

Formerly it was held that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of *gaol delivery* within his own county, where he was born or inhabited. 8 *Rich.* 2. c. 2. 33 *H.* 8. c. 24. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 *Geo.* 2. c. 27. "to allow any man to be a justice of *oyer* and *terminer* and general *gaol delivery* within any county of England^a."

Judge may try prisoners in his own county.

The judges sit by virtue of five several authorities. 1. The commission of the peace. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol delivery*. 4. A commission of assize, directed to the judges and clerk of assize, to take the assizes: that is, to take the verdict of a peculiar species of jury called an assize; and summoned for the trial of landed disputes. 5. That of *nisi prius*, which is a consequence of the commission of assize being annexed to the office of those justices by the *stat.* of *Westm.* 2. 13 *Ed.* 1. c. 30. and it empowers them to try all questions of fact issuing out of the courts at *Westminster*, that are then ripe for trial by jury.

Judges authority.

The original of the name is this: all causes commenced in the courts of *Westminster-hall* are by the course of the courts appointed to be there tried, on a day fixed in some *Easter* or *Michaelmas* term, by a jury returned from the county wherein the cause of action arises: but

Trial at nisi prius.

^a But no judge can sit on the *nisi prius* side, in the county where he was born or resides.

with this proviso, *nisi prius justiciarii ad assisas capiendas venerint*; unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations, preceding *Easter* and *Michaelmas* term, and there dispose of the cause; which saves much expence and trouble both to the parties, the jury, and the witnesses.

The several
circuits.

The several counties in *England* are divided into six circuits, *viz.*

The *Midland*, containing the counties of

Northampton,		Derby,
Rutland,		Leicester,
Lincoln,		Warwick.
Nottingham,		
	Norfolk.	
Bucks,		Cambridge,
Bedford,		Norfolk,
Huntingdon,		Suffolk.
	Home.	
Hertford,		Sussex,
Essex,		
Kent.		Surry
	Oxford.	
Berks,		Gloucester,
Oxford,		Monmouth,
Hereford,		Stafford,
Salop,		Worcester.
	Western.	
Southampton,		Cornwall,
Wilts,		Devon,
Dorset,		Somerset.
	Northern.	
York,		Cumberland,
Durham,		Westmoreland,
Northumberland,		Lancashire.

The assizes are held for *Durham*, *Northumberland*, *Cumberland*, and *Westmoreland* once in the year only, *viz.* in the summer; but they are held for *York* and *Lancaster* twice in the year. For *Bristol* once in the year, *viz.* in the summer.

Officers.

The officers belonging to each circuit are, the clerk of assize, the associate, clerk of arraigns, clerk of indictments, judge's marshal, cryer, clerk, and tipstaff.

The sheriff of each county, and his deputy, are to attend the judges, and the coroners also attend to deliver in all inquisitions, &c. to the clerk of assize in court, and he is to return all writs of *venire*, *distringas*, and *habeas corpora*, where the sheriff is a party in the suit; which writs are specially directed to him for that purpose.

Clerks of assize and associates for the several circuits Clerks of assize,
are,

Home. *William Gould*, Esq. Deputy, *Mr. J. W. Knapp*.

Associate, *Mr. Thomas G. Knapp*.

Clerk of arraigns, *Mr. M. J. Fitzpatrick*.

Midland. *John Blencowe*, Esq. Deputy, *Mr. J. F. Hilditch*.

Associate, *Mr. R. W. Forbes*.

Norfolk. *Gerrard Dutton Fleetwood*, Esq. Deputy, *Mr. Bury*.

Associate, *Mr. Bury*. Deputy, *Mr. Geo. Giles*.

Northern. *Fletcher Rigge*, Esq.

Associate, *Mr. James Crossfield*.

Oxford. *Meredith Price*, Esq.

Associate, *Mr. Benjamin Price*.

Clerk of arraigns, *Mr. Brookes*.

Western. *John Follet*, Esq.

Associate, *Mr. Newman*.

Clerk of arraigns, *C. Higden*, Esq. of Indict.

Mr. Proby.

No clerk of assize shall act as counsel on the circuit,
on pain of 10l. 33 H. 8. c. 24.

Of the Terms.

THE *Terms*, are those spaces of time, wherein the Terms,
courts of justice are open, for all that complain of wrongs, or injuries, and seek their rights by course of law or action, in order to their redress, and during which the courts of *Westminster-hall* sit and give judgments, hear complaints, &c.

These *Terms* are supposed, by *Selden*, to have been When instituted.
instituted by *William the Conqueror*, but *Spelman* hath shewn that they were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year, which were not

occupied by the greatest festivals or fasts; or which were not liable to the general avocations of rural business.

Formerly the whole year was one term.

In very early times, the whole year was one continual term, for hearing and deciding causes; but when our legal constitution came to be settled, the commencement and direction of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king *Edward the Confessor*, "*That from Advent to the octave of the Epiphany,*" from *Septuagesima* to the *octave of Easter*, from the *Ascension* to the *octave of Pentecost*; and from three in the afternoon of all *Saturdays* till *Monday* morning, the peace of God and holy church should be kept throughout all the kingdom. And so extravagant afterwards the regard that was paid to these holy times, that though the author of the *Mirror* mentions only one vacation of a considerable length, containing the months of *August* and *September*; yet *Britton* is express, that in the reign of king *Edward I.* no secular plea could be held, nor any man sworn on the evangelists in the times of *Advent*, *Lent*, *Pentecost*, *harvest*, and *vintage*, the days of the great litanies, and all solemn festivals: but he adds, that the bishops and prelates did nevertheless grant dispensations, of which many are preserved in *Rymer's fœdera* of the time of king *Henry III.* that assizes and juries might be taken in some of these holy seasons, upon reasonable occasions. And soon afterwards a general dispensation was established in parliament by statute *West. 1. 3 Ed. 1. c. 51.* which declares, that as it is great charity to do right unto all men at all times when need shall be, it is provided, "*That assizes of novel disseisin, mort d'ancestor, and darrein presentment should be taken in Advent, Septuagesima, and Lent, even as well as inquest, and that at the special request of the king to the bishops.*" The portions of time not excluded within these prohibited seasons, fell naturally into a fourfold division, and from some festival or saint's day that immediately preceded their commencement, were denominated the terms of *Saint Hilary*, *Easter*, *Trinity*, and *Michaelmas*: which terms have been since regulated and abbreviated by several acts of parliament, particularly *Trinity* term, by stat. 32 *Hen. 8. c. 2.* and *Michaelmas* term, by stat. 16 *Car. 1. c. 6.* and again by stat. 24 *Geo. 2. c. 48.*

The

The courts of *king's bench*, *common pleas*, and *exchequer*, are the only courts confined to the terms; the *court of chancery* is not, nor the *high court of parliament*, the *privy council*, the *court of lord high steward*, or the inferior courts. The *exchequer* may it is said sit out of term. *Mad.* 551.

There are, in each of these terms, stated days called days in bank, *dies in banco*, that is, days of appearance in the court of common pleas, called usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis*, which are generally at the distance of a week from each other, and regulated by some festival of the church: on some one of these days in bank, all *original writs* must be made returnable; and therefore they are generally called the returns of that term; whereof every term has more or less, said by the *Mirror*, c. 5. sec. 108. to have been originally fixed by king *Alfred*, but certainly settled as early as the stat. of 51 *Hen.* 3. st. 2. 3 *Black. Com.* 277. But though many of the return days are fixed upon *Sundays*, yet the court never sits to receive these returns till the *Monday* after; and therefore no proceedings can be had, or judgment given on the *Sunday*. *Salk.* 627. 6 *Mod.* 250. 1 *Jon.* 156. 2 *Lill. Abr.* 569.

51 H. 3. st. 3.
32 H. 8. c. 21.
1 Inst. 135.

The first return in every term is, properly speaking, the first day in that term; as for instance, the *octave of Saint Hilary*, or the eighth day inclusive after the feast of that saint; which falling on the thirteenth of *January*, the *octave* therefore, or the first day of *Hilary term*, is the twentieth of *January*: and thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day* of the term. But the person summoned has *three days of grace*, beyond the return of the writ, in which to make his *appearance*; and if he appears on the *fourth day inclusive*, it is sufficient. 2 *Lill. Abr.* 569. 1 *Inst.* 135.

First return of the term.

The term regularly is esteemed as one day, 4 *Co.* 71. a. and the first day is the *essoign day*, for the *quarto die post* is a day of grace. 1 *Bul.* 35. *Walter's case*. Judgment relates to the first day, though a day be assigned for argument at a day subsequent. 1 *Bul.* 69. The *quarto die post* is the full term, and the day for appearance of the parties. 1 *Bul.* 35. There shall

Regularly one day.

be no judgment against defendant upon his default, till the *quarto die post*. *Ibid*.

It is said, judgments relate to the *essoign day* if proceeding be *by original*; if *by bill*, to the *quarto die post*. *Sell. 8. sed quære.*

In *Belk v. Broadbent*, Lord Kenyon said, No doubt but that in the eye of the law the *essoign day* is for many purposes the *first day* of the term; the *quarto die post* is only an indulgence. And Buller J. said, though the courts do not actually sit on the *essoign day*, yet in law it is considered as the *first day* of the term. 3 Term Rep. 185.

Judgments relate to the *essoign day* of the term. Barnes, 268.

Returns of Writs.

Michaelmas term, which contains three weeks and two days, hath four returns.

By Original.

1. On the morrow of All Souls.
2. On the morrow of Saint Martin.
3. In eight days of Saint Martin.
4. In fifteen days of Saint Martin.

By Bill.

1. On next after the morrow of All Souls.
2. On next after the morrow of Saint Martin.
3. On next after eight days of Saint Martin.
4. On next after fifteen days of Saint Martin.

Hilary term, which contains three weeks, hath four returns.

By Original.

1. In eight days of Saint Hilary.
2. In fifteen days of Saint Hilary.
3. On the morrow of the Purification.
4. In eight days of the Purification.

By Bill.

1. On next after eight days of Saint Hilary.
2. On next after fifteen days of Saint Hilary.
3. On next after the morrow of the Purification.
4. On next after eight days of the Purification.

Easter term, which contains three weeks and six days, hath five returns.

By Original.

1. In fifteen days of Easter.
2. In three weeks after Easter.

By Bill.

1. On next after fifteen days of Easter.
2. On next after three weeks from the day of Easter.
3. On

- | | |
|------------------------------------|--|
| 3. In one month after Easter. | 3. On <i>next after one month from the day of Easter.</i> |
| 4. In five weeks from Easter-day. | 4. On <i>next after five weeks from the day of Easter.</i> |
| 5. On the morrow of the Ascension. | 5. On <i>next after the morrow of the Ascension.</i> |

Trinity term, which contains twenty days, hath four returns.

By Original.

1. On the morrow of the holy Trinity.
2. In eight days of the holy Trinity.
3. In fifteen days of the holy Trinity.
4. In three weeks after the holy Trinity.

By Bill.

1. On *next after the morrow of the holy Trinity.*
2. On *next after eight days of the holy Trinity,*
3. On *next after fifteen days of the holy Trinity.*
4. On *next after three weeks of the holy Trinity.*

Every day in the term (except Sundays, or days on which the court do not sit) is a good return by bill: the court do not sit on the feast of the Purification, Ascension day, and Midsummer-day, unless it happens on Friday next after Trinity Sunday; then it is good by Stat. 32 H. 8. c. 21.

Observations on the Terms.

HILARY TERM, begins January 23, (except it When Hilary happens on Sunday,) then on the Monday follow- term begins. ing, and ends February the 12th, if not Sunday, then on the Monday following.

Easter Term, begins Wednesday fortnight after Easter Easter term. day, and ends on Monday before Whitsunday.

Trinity Term, begins on the Friday after Trinity Sun- Trin. term. day, that day being appointed by the 32 H. 8. c. 21. and ends the Wednesday fortnight after, unless it happens to be on the 24th of June, the feast of St. John the Baptist, which is no court day; then it must be adjourned to the next day. See Cro. Jac. p. 16. 2 Bulstrode, 242.

Michaelmas Term, begins November the 6th, (ex- Michaelmas cept it happens on a Sunday,) then on the Monday next term. after, and ends November the 28th, (except it be on Sunday,) then the 29th. Stat. 24 Geo. 2. c. 48.

The issuable terms are *Hilary* and *Trinity*.
 When no sittings, There are no sittings in *Westminster-hall* on *Ascension-day*, *Midsummer-day*, and the second day of *February*, being the *Purification*.

The *Exchequer* opens eight days before any term (except *Trinity*), before which, it opens but four days.

The first and last days of every term are the days of appearance.

Appearance days.

Trinity term enlarged a day, the last day being *Midf. day*.

Trin. 35 *Geo.* 3. 1795. Whereas the present *Trinity Term* will not end until *Thursday* the 25th *June* instant, It is ordered, That the sittings for trials of causes at *nisi prius*, do commence in *Middlesex* on *Friday* the 26th instant; and in *London* on *Saturday* the 27th instant; instead of the days already appointed. And that writ issued out of this court, may be made returnable on *Thursday* next after three weeks of the *Holy Trinity*. The fact was, that *Midsummer-day* happened, 24th *June* 1795, on a *Wednesday*, and the last day of that term.

The same thing happened in 1556. *Br. Adj.* 35. The like happened in *C. J. Holt's* time. *Farr.* 117. who said *Trinity* term may begin, but cannot end on *Midsummer-day*.

Observations on the Returns of Writs.

What days are to be avoided in the return of the writ.

ALL non-judicial days must be avoided, on which no writ can be made returnable, such as the feast of the *Purification*, in *Hilary* term; *Ascension-day*, in *Easter* term; and *Midsummer-day*, in *Trinity* term, if it so happen (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus*, by stat. 32 *H.* 8. c. 21.), and writs returnable on any of these days are not good. 2 *Inst.* 264. Sunday is *dies non juridicus*. 5 *Mod.* 252.

If a writ be returnable on a *dies non juridicus*, it is void. 6 *Mod.* 148. 196.

11th Nov,

The eleventh day of *November*, being the feast of *St. Martin*, in *Michaelmas* term, cannot be said to be in or upon any return; and if a writ be returnable on that day, it must be returnable on *Thursday* the feast of *St. Martin*, or any other day in the week it falls on, and if returnable the day after, *Friday*, the morrow of *St. Martin*.

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In this court every *bill of Middlesex, latitat, alias capias, pluries capias, distringas, and habeas corpus ad satisfaciend.* must be returnable on a day certain, as on Monday next after, &c. and may be returnable after the first day in full term, as the 6th of November, on an *essoign*, or general return-day in term time; but then the day of the week must be expressed, as on Friday in one month, &c. But this is seldom used, unless in order to get some advantage in that term. If the *essoign day* happens on a Sunday, writs by bill must be made returnable on the first day of the term, being the day on which the court sit.

Return of writs by bill.

The award of any judicial writ on a Sunday is void. *Sir W. Jones.* The court must take judicial notice of the commencement and return of the terms. For the calendar is the law of the land. 6 *Mod.* 250.

Award of process on Sunday void. Almanack.

Restoration day, 29th May 1767. Only one judge came down. It is not usual that any business is done upon this anniversary. But this being the last common paper day, the one judge went through the paper; otherwise the parties could not have had their judgments within this term. *E. T. 7 Geo. 3. 4 Burr.* 2089.

K. Ch. restor. day.

All writs of *capias, alias, and pluries*, grounded on an original out of chancery; and all writs subsequent thereto, to the outlawry, writs of *scire facias quare executionem et audiendum errores*, upon writs of error out of the common pleas, or other inferior courts, writs of *capias ad satisfaciendum, fieri facias*, and other judicial writs after judgment affirmed, *retorno habendo, capias in withernam*, and all other writs and process, grounded upon any *recordari facias loquelam, audita querela, accedas ad curiam, capias si laicus*, and every other judicial writ of chancery, must not be made returnable on a day certain, but on a general return or *essoign day, ubicunque*, as from the day of Easter in fifteen days, *wheresoever we shall then be in England.*

Writs grounded on an original.

In all original writs, there should be at least fifteen days between the teste and return. 2 *Inst.* 567. So of the *alias* and *pluries*, though if there be less it will be aided by appearance and pleading in chief. 1 *Ld. Ray.* 671.

The court of common pleas amend all *mesne* process in the teste, and also an attachment of privilege, as no error can be assigned in *mesne* process. 3 *Wils.* 454.

In

When there
need not be 15
days between the
teste and return.

Exception.

In all actions of debt, and all other personal actions by ejectment, brought by original, there need not be fifteen days between the teste and return of any writ or writs of *venire facias*, *habeas corpora juratorum*, or *distringas juratores*, *fieri facias*, and *capias ad satisfaciendum*; and the want thereof shall not be assigned for error; but this not to extend to any writ of *ca. sa.* whereon any exigent after judgment is to be awarded, or to a *capias ad satisfaciend.* against the defendant, to make the bail liable: these writs are to have 15 days between the teste and return. *Stat. 13 Car. 2. c. 2. sect. 6, 7.*

Rules necessary for Practisers.

GENERAL rules are wisely established for attaining justice with ease, certainty, and dispatch. But the great end of them being *to do justice*, the court are to see that it be really attained. 1 *Burr.* 301.

The practice of the court, forms the law of the court: The plaintiff and defendant are both bound to take notice of the *general rules of practice* in this court; but if there be a *special particular rule* of court made for the plaintiff, or for the defendant, he for whom the rule is made, ought to give notice of this rule unto the other, or else he is not bound generally to take notice of it, nor shall be in contempt of the court, although he do not obey it: for *general rules* are the practice of the court, whereof every one must take notice, that hath to do there; but *particular rules* are made upon particular and extraordinary matters happening in the proceedings, upon the motion of one of the parties made to the court; of which the other may be ignorant, and therefore is to have notice of them given unto him.

Affidavit to hold
to bail.

It is not sufficient for the plaintiff to swear *positively* to a debt to hold to bail, without shewing also the nature of that debt. *Jacks v. Pemberton*, 5 *Term Rep.* 512.

No supplemental
affidavits.

If an affidavit to hold to bail be defective, *this court* will not permit the plaintiff to file a *supplemental one*. *Ibid.* *Dougl.* 467. *Cope v. Cooke*, 5 *Term Rep.* 552. S. P.

Illiterate persons
swearing affida-
vits.

If an affidavit be made by any person before a commissioner, who from his or her *signature* appears to be *illiterate*, he shall certify or state in the jurat, *that it was read in his presence, and that he seemed perfectly to understand*.

understand the same, and that the party wrote his or her name in the presence of the commissioner taking the affidavit.

R. E. 31 Geo. 3.

In an affidavit to hold to bail, it is not necessary to intitle the affidavit in the cause, or in the *K. B. Adams v. Pinfold*, E. 34 Geo. 3. So in C. P. *Adams v. Ashfield*, the elder, S. P.

No need to intitle affidavit to hold to bail.

But to ground a motion in a cause in court, the affidavit must be intitled, in the king's bench, the names of the plaintiff and defendant; otherwise it is a good objection, and a rule obtained on it will be discharged. E. T. 31 Geo. 3. 31 May, Lord Kenyon gave notice of this in court, and said, that attornies ought to be careful in this respect, for he thought them answerable to their clients for the consequences; and the master certified this to be the constant course of the court.

Affidavit to ground a motion.

But it is the practice of the court to receive affidavits against any rule for a criminal information, without any title in the cause, until the rule is made absolute. *Rex v. Harrison*, 6 Term Rep. 60. contra 1 Str. 704. Andr. 313.

Crim. inform.

Affidavits made for an attachment, for not performing an award, (there being no action depending,) need not be intitled, but the affidavits in answer must. *Bevan v. Bevan*, 3 Term Rep. 601.

Attachment for not obeying award.

Bail above, may be put in on a *dies non juridicus*. *Baddeley v. Adams*, 5 Term Rep. 170.

Bail above on a dies non, good.

If the plaintiff hold two defendants to bail on a joint writ, and declare against them separately, the court will set aside the proceedings. *Moss v. Birch*, 5 Term Rep. 722.

Two defendants cannot be held to bail in a joint action.

If the declaration be taken out of the office, it cures the defect in the process. *Caswall v. Martin*, 2 Str. 1072.

Decl. taken out cures defect in process.

An error in *mesne process*, is cured by appearance, 1 Str. 155. because the only intent of *mesne process* is to bring the defendant into court. *Lucas* 86. *Wid- rington v. Charlton*. *Cas. temp. Hard.* 39.

Error in mesne process is cured.

If the defendant be served by a wrong name, and he appears by his right one, it is cured, if the plaintiff declare against him by his right name. *Doe v. Butcher*, 3 Term Rep. 611. But if the defendant does not enter his appearance, it is not in the power of the plaintiff to set it right by filing appearance in his right name. *Ibid.*

But can never be cured by plaintiff's entering appearance.

All

Irregularities to be complained of in the first instance.

All *irregularities* in the *process*, or *declaration*, should be complained of before interlocutory judgment; for whenever the proceedings are *irregular*, the court will, if the application be made in the *first* instance, set them aside; but if the defendant *lies by*, and suffers the plaintiff to proceed, the court will not assist him. 3 Term Rep. 7. 10. Delay is an answer to any objection of irregularity, *per Buller, J.* and the party who applies for a favor must come to the court in the *first* instance.

Distinction between a mere irregularity and defect in the proceeding.

There is a distinction between a *mere irregularity* in the mode or time of proceeding, and a *defect* in the *proceedings* themselves. Therefore if an affidavit be, that the maker and indorser of a note are *severally* indebted to the holder on *one* stamp only, including both in the writ with several *ac-etiams*, neither can be held to bail; and if either be, *and the bond be assigned*, though one put in bail only, yet he may move to set same aside for the defect. *Hussey v. Wilson*, 5 Term Rep. 254. The appearance in this case does not cure it.

If there be an irregularity, it must be shewn.

Where an *irregularity* is complained of, the party complaining must *shew the irregularity*; and not put it upon the other party to vindicate his proceedings, and shew that he is irregular. *Rex v. Perry*, 5 Term Rep. 464.

On stat.

27 Geo. 3. c. 1. an affidavit must be filed though the writ be not bailable.

If no affidavit of debt specifying the penalties be made and filed previous to the issuing the writ under the *stat. 27 Geo. 3. c. 1.* though the defendant take the declaration out of the office, yet he may move to quash the writ, and stay the subsequent proceedings; although plaintiff did not in such writ hold him to bail, nor specify in it the penalties which is directed by the act. *King qui tam v. Horn*, 4 Term Rep. 349.

An action on a penal statute is not to be commenced in a mode prohibited by the act.

Where several persons have *separately* incurred penalties for printing illegal schemes of the lottery, a *separate* affidavit must be made and filed against each of them, and if they be *all* joined in *one* affidavit, the irregularity is not waived by *putting in bail*, but the court will quash the writ on motion. The plaintiff would have agreed to accept *common bail*, but the court said, we are to take care that an action on a *penal* statute shall not be commenced in a mode prohibited by the statute. *Goodwin qui tam v. Parry*, 4 Term Rep. 578.

Irregularity in process, a copy to be annexed.

If the defendant complains of *irregularity in process* or *notice*, he must annex the copy to his affidavit, that it may appear to the court.

If a prisoner be *superfedeable* for any irregularity, as for want of a demand of plea, he cannot take advantage of it, after he is charged in execution. *Rose v. Christfield*, 1 Term Rep. 591.

If prisoner do not take the first advantage.

If the defendant swear that the debt for which the action is brought is under 40s. he may move to stay the proceedings, which the court will order, if plaintiff does not deny it. *Wellington v. Arters*, 5 Term Rep. 64.

If debt be under 40s.

If a rule to return the writ be taken out in the vacation, although it be dated the first day of the next term, and an attachment be granted for not obeying it, the court will set aside the attachment. For such a rule is false in itself, irregular, and improper. *Rex v. Sheriff of Cornwall*, 1 Term Rep. 552. This rule was taken out before the commencement of Mic. term, and intitled the first day of that term.

Rule taken out in vacation, and dated the first day of the next term, held irregular.

A sheriff cannot be ruled to bring in the body until the day after the expiration of the rule to return the writ. *Hodgson v. Nugent*, 5 Term Rep. 277.

Rule to bring in the body.

The four days allowed for pleading in abatement are both inclusive. *Jennings v. Webb*, 1 Term Rep. 277. If the last of the four days happen on a Sunday, then defendant has all Monday. S. P. 5 Term Rep. 210.

Pleading in abatement.

A rule to plead is necessary to compel a plea in bar, but it may be dispensed with by pleading either in bar or abatement. *Brandon v. Payne*, 1 Term Rep. 690. But where no time has been given by a judge's order, a rule to plead may be dispensed with.

Rule to plead, when dispensed with.

A month's time to plead means a lunar month, or four weeks. 3 Burr. 1455. And so in all legal proceedings a month means four weeks. *Ibid.* *Tullet v. Linfield*.

A month's time means a lunar month.

On a *quare impedit*, six months are understood six calendar months. *Ibid.* 13 Ed. 1. c. 5.

Quare impedit.

There is a distinction between the temporal and the ecclesiastical law, in interpreting this term, "month;" the former understands it to be lunar, the latter to be calendar; per *Denison*, J.

Eccl. and temp. courts distinction.

An attorney of this court, is only entitled to 4 days time to plead, though he reside more than twenty miles distant from London. *Man v. Fletcher*, 5 Term Rep. 369. *Contra* in the other courts.

Attorney 4 days to plead.

The demand of a plea must be given after the rule to plead entered, and not on same day declaration is delivered,

Demand of plea.

Judgment for want of plea.

Plea may be filed before judgment.

When new rule to plead.

When need none.

Rule to be given after filing or delivery of decl.

When demand of plea not necessary.

24 Hours exclusive of Sunday.

When demand of plea waiver of bail, or justification.
If injunction, no new rule necessary.

Rule to abide by plea, what plea may be pleaded.

When cannot take judgment for want of plea, although plea is informal.

delivered, or rule given. And in cases where defendant puts in bail, or enters his appearance in due time. *Nott v. Oldfield*, 1 *Wils.* 134. And must be delivered *twenty-four hours* before judgment can be signed. *Dyche v. Burgoyne*, 1 *Term Rep.* 454.

Judgment may be signed for want of a plea on the 5th day in the afternoon; provided a rule to plead has been duly given, and demand of plea made *twenty-four hours previous* (if such demand was requisite).

If plaintiff delay signing judgment, a plea may be filed or delivered, although the rule is expired. 1 *Term Rep.* 17. *Minns v. Baxter*.

If a declaration be delivered in *Michaelmas* term, and rule to plead given; if the plaintiff does not sign judgment in *Michaelmas* term, and *Hilary* term is commenced, *a new rule to plead again is necessary*, to warrant the judgment of *Hilary* term.

If time to plead be given in vacation to the first day of the next term, no new rule is necessary to warrant the judgment.

The rule to plead cannot be regularly given, until the *declaration be actually filed or delivered*; and must be so given in *term*, or within *four days after*.

There are three cases in which a demand of a plea is not necessary: 1. *Where the plaintiff files common bail according to the statute.* 2. *Where the defendant is in custody of the sheriff.* 3. *If defendant does not file bail or enter his appearance.* *Rose v. Christfield*, 1 *Term Rep.* 591. 636. *Cooke v. Raven*.

If a plea be demanded on *Saturday*, the defendant has *twenty-four hours* to plead *exclusive of Sunday*. *Solomons v. Freeman*, 4 *Term Rep.* 557.

The demand of a plea is a waiver of bail, if no bail at that time put in; but if the bail be put in, it is a waiver of the justification only.

Where the plaintiff, after giving a rule to plead, is delayed by injunction, a *new rule* is not necessary to be given after injunction dissolved, nor a new demand of plea if there has been one previously given.

After a rule to abide by a plea, or plead such other, defendant can only plead the *general issue*, and give notice of *set-off*; or he may, with leave, plead the *set-off*. *Cockran v. Robertson*, 1 *Term Rep.* 693.

If under a judge's order to plead *issuably*, the defendant put in a plea, though *informal*, which goes to the

the substance of the action, the plaintiff cannot sign judgment, as for want of a plea. *Thelluson v. Smith*, 5 Term Rep. 152.

It is an invariable practice of the court to grant *one rule only*, to set aside an irregular judgment, and the subsequent proceedings on that judgment, in whatever mode the party may have proceeded after the judgment. *Barlow v. Kaye*, 4 Term Rep. 689.

One rule to set aside irregular judgment and subsequent proceedings.

Where the plaintiff files common bail for the defendant, on any day between the 2d and 6th of November, and he is in other respects entitled to sign judgment, it is signed as *on the day preceding the effoign day of Michaelmas term*. *Wansley v. Moore*, 5 Term Rep. 65.

Of judgment signed before effoign of Mich. term.

In an action on a judgment, the defendant cannot apply to stay the proceedings pending error on that judgment, until he has put in bail. *Smith v. Shepherd*, 5 Term Rep. 9.

No stay of proceedings pending error till bail put in.

A defendant in replevin, is *not* entitled to move for judgment as in the case of a nonsuit. *Shortridge v. Hiern*, 5 Term Rep. 400.

Nonsuit in replevin.

The court will not grant a *new trial* for the purpose of letting the party into a defence which he might have made at the first trial. *Salk*. 653. 1 *Wils.* 98. 1 Term Rep. 84.

New trial.

The plaintiff is not bound to give notice of trial, till the *term after that*, in which issue is joined. *Hall v. Buchanan*, 2 Term Rep. 734.

When not bound to give notice of trial.

Any attendance on any judge's summons, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance, and as effectual, as an hour's attendance on any summons has heretofore been. *Rule Trin. Term. 35 Geo. 3.*

Attendance on a judge's summons half an hour.

Ordered, that on every appointment to be made by the master, the party on whom the same shall be served, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment. *R. Hil.* 32 Geo. 3.

Master to be attended on first appointment.

Ordered, that a defendant be *not* allowed *oyer of an original writ*; and that if he demand it, the plaintiff may proceed as if no demand had been made. *Trin.* 19 Geo. 3.

Oyer of original not allowed.

Ordered, that in all actions by *special original writ*, if plaintiff recover *less than 50l.* he shall not be allowed more

Special original, proceeding by.

more costs than he would be entitled to in case he had proceeded by bill except in such actions in which he could not proceed by bill; or in which any defendant shall be actually outlawed). *R. M. 23 Geo. 3.*

Day rules king's bench prison.

No prisoner to have day rules above three days in each term, and shall return within the walls or rules of the prison *at or before nine in the evening of the day* such rule shall be granted. *R. E. T. 30 Geo. 3.*

Bail-pieces.

Ordered, that the clerk of the bails mark the bail-pieces numerically as they are received. *E. T. 30 Geo. 3.*

Ordered, that the *custos brevium* shall indorse on every writ, on what day, and at what hour the same was filed. *R. Trin. 30 Geo. 3.*

Writs to be returned by the sheriff.

Ordered, that in future all writs shall be returned by the sheriff, on the day on which the rule for returning the same shall expire; in default, plaintiff to be at liberty to move for an attachment on the next day. *R. Trin. 32 Geo. 3.*

Affidavits sworn in court to be filed, and copies taken before read.

Ordered, that affidavits to be read in court, or before the master, be brought to the clerk of the rules, to be filed in such convenient time, that copies of them may be duly made and delivered to the party filing the same. *R. M. 9 Geo. 2.*

Enlarged rules.

Ordered, that all enlarged rules to shew cause made in the last term, shall be moved for *before the last day of the present term*, unless leave for postponing them shall be particularly applied for and granted. *M. T. 30 Geo. 2. 1 Burr. 9.* And all causes shall come on to be argued in the same order that they are entered, and that they shall continue to stand in the paper in the same order till they shall be argued, (without being entered a-new,) and that *no cause* shall be *put off* without a *special application* to the court upon some special ground, *before* the day upon which it stands in the paper for argument. *Ibid. 52.*

Rules enlarged to be fixed for peremptory days, and lists to be made thereof.

Ordered, that every rule, which shall be enlarged to the next subsequent term, shall be fixed to a particular peremptory day; namely, the *first five* enlarged rules either on the *criminal* or *civil side* of the court, (as they may happen,) for the *first day of the next term*; the *second five*, for the *second day* of it; the *third five*, for the *third day*; and so on, *toties quoties*, to the sixth, seventh, eighth, ninth, tenth, and following days of such subsequent term; and that *after every term*, there be a list made

made out and fixed up in the offices, both on the crown and civil side of the rules so enlarged, and the particular days when the respective motions are to come on; and that a copy of such lists be delivered to the judges respectively, the day before the beginning of every term. *Hil. 6 Geo. 3.*

It is ordered, that all rules enlarged till next term be peremptory; and that *six* be set down for every day; and the like in future every term. *Hil. 15 Geo. 3.* Six for each peremptory day.

It is ordered, that all rules enlarged till the next term be peremptory; and that *eight* be set down for every day; and the like in every future term. *M. 17 Geo. 3.* Eight for each peremptory day.

Motions in arrest of judgment may be made within the first four days of the term, but Sunday is not to be esteemed one of the four. *4 Burr. 2130. Mich. Term, 7 Geo. 3.* Arrest of judgment.

A motion in arrest of judgment may be made at any time before judgment signed. *Dougl. Rep. 745. Taylor v. Whitehead.* May be made before entered.

Motions for new trials ought to be made within the first four days, but in case of delay occasioned by no wilful act of the party, it may be moved for on the fifth day, viz. where counsel had neglected to move. *Dougl. Rep. 171. Bert v. Barlow.* And where the attorney was taken ill, and died on the road to London. *Doe ex dem. Davie and others, v. Haddon and others, E. T. 1784.* New trials.

Motion for a new trial, and a motion in arrest of judgment, may not be made both together, the former must precede. *1 Burr. 334. Rex v. White.* New trial and arrest of judgment.

Motion in arrest of judgment may be made on the crown side, at any time before sentence pronounced. *2 Burr. 801. Rex v. Robinson.*

A motion may be made in arrest of judgment, after a rule for a new trial has been discharged, and at any time before the judgment is signed. *Dougl. Rep. 745. Taylor v. Whitehead.* Arrest of judgment.

After conviction of a misdemeanor, the defendant must be present in court, if he would move in arrest of judgment; though he need not be so, upon arguing a special verdict. *2 Burr. 930. Rex v. Spragg.* After conviction.

Personal appearance of a defendant convicted of a misdemeanor ought not to be dispensed with (upon his clerk in court undertaking for the fine), unless it be clear "that the punishment will not be corporal, only
H "pecuniary,

When personal appearance may be dispensed with.

Attachment
when absolute
in the first in-
stance.

“pecuniary, and not in every case even of that kind.”
3 Burr. 1787, *Rex v. Hann.*

Ordered, that attachments shall be absolute in the first instance, only in the three following cases: First, for non-payment of costs on the master's allocatur; secondly, against a sheriff for not obeying a peremptory rule to return a writ, or bring in the body; thirdly, for contempt of the court in the execution of the process of the court. Tr. 17 Geo. 3.

Attachment.

On the last day of a term an attachment cannot be moved for, except, first for non-payment of costs.

Return of writ.

5 Burr. 2686. 2dly, Against a sheriff for not returning a writ. 1 Burr. 657. Trin. 31 Geo. 2. And 3dly, For not bringing in the body.

Indictment.

And that counsel may move on the last day of term, to quash an indictment, but not to quash an order. *Ibid.*

Information.

A joint information may not issue upon several distinct rules, for one or more information or informations against each defendant. 3 Burr. 1271. *Rex v. Haydon.*

To answer.

On the last day of term, a motion to answer the matters of an affidavit cannot be made. 4 Burr. 2502. *Jacob's case.*

When attach-
ment refused.

When a party against whom an attachment is prayed, positively denies the charge by affidavit, this court always refuse the attachment, without entering into the merits, or the credit of the parties. Dougl. Rep. 5:6. *The King v. Vaughan.*

If plaintiff dies
after verdict.

If plaintiff dies after verdict and before judgment entered thereon, a *scire facias* must be awarded before execution. *Earl v. Brown*, 1 Wils. 302.

If pending argu-
ment either
party dies.

If pending an argument on a special verdict, and the court takes time to consider thereon, either party dies, the judgment will be ordered to be entered as of the term in which judgment ought to have been signed. 1 Burr. 226. 147. 4 Burr. 2277.

Bail may now
render without
justification,
although rule
to bring in the
body is served.

Bail may now render without justification, although excepted against; or although the rule to bring in the body is served; and although the bond be assigned; on payment of costs.—So bail who have been excepted to, and not justified, although other bail have been added, and one rejected, the first bail not being struck out of the bail-piece. *Rex v. Sheriff of Essex*, 5 Term Rep. 633. R. T. 33 Geo. 3. 5 Term Rep. 531.

Where

Where no *specific day* is mentioned in an act of parliament from which it is to take effect, it commences by *legal relation* from the *first day* of the *session*. *Latless v. Holmes*, 4 Term. Rep. 660. 6 Bro. P. C. 553.

Day in an act of parliament.

Arrest.

AN arrest in a civil cause is defined to be, the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice. *Wood's Inst.* 575. And must be by corporal seizing or touching the body of defendant. 1 Vent. 306. *Cowp. Rep.* 165.

Arrest.

In making the arrest, it is *not* necessary that the officer who has the authority should be the hand that arrests, nor in the presence of the person arrested, nor actually in sight; it will be sufficient if he be near, and acting in the arrest. *Cowp. Rep.* 65. *Blatch v. Archer*.

How near officer need be, on arrest.

By *stat. 12 Geo. 1. c. 29.* it is enacted, "That, after 24th day of *June 1726*, no person shall be held to special bail on any process issuing out of any superior court, where the cause of action shall *not* amount to 10*l.* or upwards; and in all cases where the cause of action shall *not* amount to the sum of 10*l.* or upwards, in any superior court (and the plaintiff shall proceed by the way of process against the person), he shall not arrest the body of the defendant, but shall serve him, &c. personally with a copy of the process.

None to be held to special bail in a superior or court under 10*l.*

"That in all cases where the plaintiff's cause of action shall amount to more than 10*l.* *affidavit* shall be made and filed of such cause of action (which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy), which oath such officer, or his deputy, are hereby empowered to administer; and for such affidavit one shilling, over and above the stamp duties, shall be paid, and no more; and the sum specified in such affidavit shall be indorsed on the back of such writ or process; for which sum the sheriff, or other officer

Where the cause of action amounts to 10*l.* affidavit to be made thereof, and the sum indorsed on the back of the writ.

Where there is
no affidavit.

"to whom such writ or process shall be directed, shall take bail, and for no more: But if any writ or process shall issue for 10 l. or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff shall not proceed to arrest the body, but shall proceed in like manner as is by this act directed in cases where the cause of action does not amount to ten pounds, or forty shillings, or upwards, as aforesaid." *Ibid. sect. 2.*

Before the making of this act, a defendant might have been arrested for any sum of money, however trifling or inconsiderable, upon a mere suggestion, without any affidavit of its being due.

The arrest cannot be made on a Sunday, except an escape, or by bail.

No arrest can be made or process served, on a Sunday; except for treason, felony, or breach of the peace. 29 Car. 2. c. 7. s. 6. 1 Salk. 78. But a prisoner who has escaped, may be retaken on a Sunday, and that either by the officer, or upon a fresh pursuit, or by virtue of an escape warrant. 2 Lord Ray. 1028. 2 Salk. 626. Also bail may take their principal upon a Sunday, in order to surrender him. 1 Atk. 239. 6 Mod. 251.

An arrest on Saturday at suit of another plaintiff, the defendant discharged. There was at the same time a detainer in the office, and he was arrested on a Sunday; court discharged the defendant.

The defendant having been arrested by the sheriff at the suit of another plaintiff on Saturday, Nov. 3, was discharged on same day: the sheriff not knowing that at that time there was a detainer lodged in his office against him at suit of this plaintiff; this being afterwards discovered, the defendant was arrested on this writ on the next day Sunday: motion to discharge him, arrest being contrary to the statute 29 Car. 2. Lord Kenyon. The defendant was not in the sheriff's custody in this action before the second arrest. But even if he had been, the distinction between a voluntary and a negligent escape is recognized in *Featherstonhaugh v. Atkinson*, Barn. 373. If a party wrongfully escape from the custody of the law, he may be retaken at any time, and is not protected by the statute, which forbids an original arrest on Sundays. But here the defendant was not guilty of any contempt; he was regularly discharged on the Saturday, the sheriff not even knowing that he was authorized to detain him. *Rule abs. 5 Term Rep. 25. Atkinson v. Jameson.*

No sheriff, &c. in Wales, or counties palatine, shall hold

By the 11 & 12 W. 3. c. 9. sect. 2. "No sheriff or other officer within the principality of Wales, or counties palatine, upon any writ or process issuing

"out of any of his majesty's courts of record at *Westminster*, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in that court, out of which such writ or process is to issue, signifying the cause of action, and that the same is twenty pounds and upwards; and where the cause of action is twenty pounds and upwards, bail shall not be taken for more than the sum expressed in such affidavit."

persons to special bail, unless the cause of action be 20l.

Bail not to be taken for more than expressed.

The bond must be made to the sheriff by his name of office, and he must be named sheriff, for the appearance of the party at the return of the writ. *Saund.* 21. And for no other purpose. The stat. 23 H. 6. mentions bailiffs, which means bailiffs of franchises and such others as have return of process. 1 *Term Rep.* 422. But bail-bonds need not pursue the very words of the writ, if according to the design it is sufficient. *Str.* 1155. 1 *Term Rep.* 240.

Bail-bond,

By the 19 Geo. 3. c. 70. s. 1. "After 1st July 1779, no person shall be arrested or held to special bail, upon any process issuing out of any inferior court, where the cause of action shall not amount to the sum of 10l. or upwards; but that copies of process shall be served (for the service of which process, a sum not exceeding 2s. 6d. shall be allowed in costs), and the like proceedings shall be had thereupon in such inferior courts, in all cases where the cause of action shall not amount to the sum of 10l. or upwards, as are directed to be had by 12 Geo. 1. c. 29. in such inferior court, in all cases where the cause of action shall not amount to the sum of 40s." *Sec.* 1.

After 1st July 1779, no person shall be arrested, or held to special bail, upon any process issuing out of an inferior court for less than 10l.

"That in all cases in such inferior court (having jurisdiction to the amount of 10l. or upwards), where the cause of action shall not amount to 10l. or upwards, the like affidavit shall be made and filed of such cause of action, and proceedings shall be had thereupon, as are directed by the said act of 12 Geo. 1. to be had, where the cause of action amounts to the sum of 40s. or upwards, in such inferior court." *Sec.* 2.

Proceedings therein in causes of 10l. or upwards, and in causes of 40s. or upwards.

By the 12 Geo. 1. c. 29. "The inferior courts could formerly hold to bail for 40s. or upwards; if under that sum, the party plaintiff was to proceed by way of service of the copy of process on the defendant personally."

No seaman shall be liable to be taken out of his majesty's service otherwise than for some criminal matter, unless the debt amount to 20l.

By 1 Geo. 2. c. 14. s. 15. No person who shall list and enter himself to serve his majesty, as a seaman on board any of his majesty's ships or vessels, shall be liable to be taken out of the service by any process or execution, other than for some criminal matter, unless for a real debt, or for other just cause of action, and unless before taking out such process or execution, not being for a criminal matter, the plaintiff, or some other person on his behalf, shall make affidavit before one or more judge or judges of the court of record, or other court, out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, that to his or their knowledge the sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants, in the action, or cause of action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of 20l. at the least, a memorandum of which oath shall be marked on the back of such process or writ, for which no fee shall be taken; and if any person shall be arrested contrary, it shall be lawful for one or more judge or judges of such court, upon complaint made by the party himself, or by any his superior officer, to examine into the same by the oath of the parties, or otherwise, and by warrant to discharge such seaman so arrested, without paying any fee, upon due proof made that such seaman was actually belonging to one of his majesty's ships or vessels, and arrested contrary to this act, and also to award to the party so complaining such costs, as such judge or judges shall think reasonable; for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs, against the defendant in the said action.

Plaintiff upon notice, &c. may enter a common appearance, and proceed to judgment, &c.

Sec. 16. That any plaintiff, upon notice first given in writing of the cause of action, to such seaman or seamen in his majesty's service, or left at his or their place of residence, before his entering into his majesty's service, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff to proceed to judgment and outlawry, and to have execution, other

than against the body or bodies of him or them so actually belonging to one of his majesty's ships as aforesaid.

A seaman upon the ship books, though he has absented himself, is a seaman within the act. *Barnes* 95. Armourers, gunners, &c. enlisted as common seamen, are within it. *Barnes* 114. 1 *Str.* 2. 7. 1 *Black. Rep.* 30.

By *stat. 35 Geo. 3. c. 6. s. 65.* "No person who is or shall enlist or enter himself as a volunteer in his majesty's service as a soldier, shall be liable to be taken out by any process or execution whatsoever, other than for some criminal matter, unless for a real debt or other just cause of action, and unless before the taking out such process or execution (not being for a criminal matter), the plaintiff or some person on his behalf shall make affidavit, &c. that to his or their knowledge the original sum justly due and owing to the plaintiff from the defendant, in the action, or cause of action, on which such process shall issue, or the original debt for which such execution shall be sued out, amounts to 20*l.* at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded; a memorandum of which oath shall be marked on the back of such process or writ; and if any person shall be arrested contrary, it shall be lawful for one or more judge of such court, upon complaint made thereof by the party himself, or by any his superior officers, to examine into the same by the oath of the parties, or otherwise, and by warrant under his or their hands and seals, to discharge such soldier, without fee, upon due proof made that such soldier so arrested was legally enlisted as a soldier in his majesty's service, and arrested contrary to the intent of this act; and also to award to the party so complaining, such costs as such judge shall think reasonable; for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the like action might have had for the recovery of his costs, in case judgment had been given for him with costs against the defendant in the said action."

Sec. 66. "Any plaintiff, upon notice first given in writing, of the cause of action to such person or persons so entered, or left at his or their last place of residence

No volunteer soldier liable to process, unless for a real debt of 20*l.*

2 *Term Rep.* 270.

Oath of the debt to be made before a judge, &c.

and a memorandum thereof marked on the back of the process.

Plaintiff may file *exemplum* appearance, and proceed to execution against the goods.

"residence before such enlisting, to file a common
 "appearance in any action to be brought for or upon
 "account of any debt whatsoever, so as to entitle such
 "plaintiff to proceed therein to judgment and out-
 "lawry, and to have an execution thereupon, other
 "than and against the body or bodies of him or them
 "so enlisted as aforesaid."

Who are within
 the act.

Serjeants are within this act as well as private men,
 so is a drummer. 1 *Black. Rep.* 29. 1 *Wils.* 216. So
 is a gunner in the train of artillery. *Stra.* 7. So a
 trooper just enlisted. 1 *Stra.* 2. So recruits just en-
 listed. But an out-pensioner of Chelsea hospital is
 not. *Barnes* 432.

But though they cannot be arrested, yet such per-
 sons may be surrendered by their bail in their own dis-
 charge. 1 *Burr.* 339. *Bond v. Isaac.* 1 *Str.* 641.
 And the court will immediately set them at large.

Who not.

This act does not extend to soldiers imprisoned for
 disobeying orders of justices. 2 *Term Rep.* 270. Or
 on any other criminal account.

Bailiff cannot
 take undertak-
 ing of a third
 person.

An agreement *in writing*, to put in good bail on
mesne process, at the return of the writ, or surrender
 the body, or pay debt and costs, made by a third per-
 son, with the sheriff's bailiff, in consideration of his
 discharging the defendant, was held void; for that
 was only a simple contract. *Rogers v. Reeves*, 1 *Term*
Rep. 418. Where the process is directed to the sher-
 riff, the indemnity must be to him only. *Ibid.*

The penalty for
 arresting of any
 person at the suit
 of another, not
 knowing there-
 of.

"If a person procure another to be arrested in the
 "marshalsea, or in any court within London, &c.
 "at the suit of any person, where there is no such per-
 "son known, or without the plaintiff's consent;
 "every person who shall procure any arrest, &c. and
 "shall be accused by indictment, presentment, or by
 "the testimony of witnesses, or other due proof, shall
 "suffer six months imprisonment, without bail or
 "mainprize; and pay to the party arrested treble
 "costs, and forfeit the sum of ten pounds for every
 "such offence; to be recovered by action of debt,
 "&c. against such person or persons, their heirs, ex-
 "ecutors, or administrators, as should or ought to
 "pay the same, by virtue or force of this act; in
 "which action no essoin shall be allowed." 8 *Eliz.*
c. 2. sect. 5.

An

An arrest was made by virtue of process out of the sheriff's court, *London*, whilst defendant was attending commissioners of bankrupt, to prove his debt. After, he brought a *hab. corp.* and removed the cause into this court. Motion to discharge him out of custody being privileged from arrest during his attendance on the commissioners court. The general rule is founded on the contempt of the court by the arrest of persons giving their necessary attendance upon it. Here the contempt, if any, was to the commissioners, and not to this court; and even the process under which the arrest was made, was sued out of another court; and it could not vary the case, that the cause was afterwards removed hither by the defendant; nor were they satisfied that the commissioners of bankrupts could be considered as a court of justice, or could afford any relief in the premises; but certainly there was no pretence for this court to interfere. *Rule refused. Kewder v. Williams, 4 Term Rep. 377.*

The court will not discharge a person in custody by process of the sheriff's court in a cause afterwards removed into this court, because he was arrested while attending commissioners to prove a debt.

For what a Person may be held to Bail.

Where there is a certain demand, which amounts to 10*l.* or upwards, as for money paid, laid out, and expended, money lent and advanced, money had and received, a demand on an account stated and settled, goods sold and delivered, work done, covenant for payment of money, money due on bond, for fees and disbursements as an attorney, or on agreement to pay a certain sum to the plaintiff (not by way of penalty), or on a judgment recovered, the defendant may be held to bail of course, on a concise affidavit, adapted to the cause of action.

So if there be a general judgment against an executor or administrator, if he has been guilty of a *devastavit*. 1 *Salk.* 98. 1 *Vent.* 355.

Executors, &c.

If an heir, executor, or administrator, personally promises and undertakes, in writing, to pay any debt, he may be arrested, if for 10*l.* or above. *Mackenzie v. Mackenzie, 1 Term Rep. 716.*

Action will not lie for a legacy.

It is now determined, that an action will not lie for a legacy, although the executor acknowledge assets. *Decker & ux. v. Strutt, 5 Term Rep. 690. contra Cowp. 289. Hawkes v. Saunders.*

So he may be held to bail on a judgment by default against him, after the sheriff has returned a *devastavit*.

Comb.

Comb. 206. *Carth.* 264. *Duprett v. Testard.* But a mere suggestion is not sufficient.

In trover the defendant may be held to bail of course. 2 *Str.* 1122. *Cowp.* 529. For this is more an action of property than a tort. 1 *Wils.* 23. *Cattin v. Gatlin.* And there is no occasion for a judge's order. *Ibid.*

So may be held
to bail on 26
Geo. 2. c. 21.

In an action on 26 *Geo.* 2. c. 21. for having unsealed wrought silks in his custody, special bail is required by the eighth section, and in this case affidavit need not be positive, for the act does not require affidavit at all. 3 *Burr.* 1569. *Rex v. Rebord.*

Soon on 11 and 12
W. 3.

Soon scan. mag.

In actions on 11 and 12 *W.* 3. for offences in exporting wool, defendant may be held to bail, but the cause of action must appear in the writ. In *scandalum magnatum* plaintiff may have special bail on motion and order. *Earl of Stamford v. Goodball, L. Ray.* 74. 1 *Sid.* 183. 2 *Mod.* 215.

If founded on a
penalty.

In debt on bond
conditioned for
an indemnifica-
tion, defendant
ought not to be
held to bail for
the penalty, but
only for the
amount of the
damages in-
curred.

It is laid down, that a defendant cannot be held to bail for a penalty, but only for the sum secured by the penalty. 6 *Term Rep.* 217. *Hatfield v. Lingard.* And in one case, which was debt on bond conditioned for the indemnification of a parish against a bastard child, the penalty was 50l. the plaintiff swore that he was indebted to him in that sum; defendant swore that only 3l. and odd shillings were really due. On motion for common bail; The court said, plaintiff's conduct was altogether unjustifiable, and that he was liable to an action. That in the case of a bond conditioned for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition. They thought at first they could not relieve defendant upon this summary application, it having been a uniform rule not to go into the merits upon such a motion, but to take the motion as it stood upon the affidavit to hold to bail; at last they granted the rule, being persuaded the plaintiff would not venture to shew cause against it. *Kirk v. Strickland, Doug.* 449. *M.* 21 *Geo.* 3. But in *Willes v. Dent, Hil.* 23 *Geo.* 3. the affidavit was, that defendant was indebted in 1000l. under and by virtue of a certain covenant contained in an agreement, the court refused a rule nisi for common bail. *Sell.* 44.

Where

Where a *bond* is given, conditioned for the payment of money, the plaintiff may hold to bail for the amount of the *real sum due*, with interest; but if they be *bonds of indemnity*, or for performance of covenants, then to the amount of the *real damage sustained by the breach of the condition*, provided the same be for payment of money, or a sum for every acre of land plowed up. For it is not reasonable to hold to bail for such damages as the plaintiff fancies he has sustained, and is pleased to swear to. *Barn. 108.* But if the penalty be the *real debt*, and in nature of stated damages, as in *bond for performance of marriage*, *Barn. 86.* or to deliver goods or forfeit 100*l.* then to the full amount of the penalty. *Vide Sid. 63. Salk. 100.*

What bonds defendant may be held to bail for, and what not.

Also defendant may be held to bail in debt on a judgment, though defendant might have pleaded bankruptcy to the first action. *Str. 477. Combs v. Blackall.* Also on a contract to transfer stock borrowed. *Adams v. Verells, Ibid. 497.*

So on judgment if he neglects to plead bankruptcy.

Upon the 9 *Ann. c. 14.* which gives an action of debt within *three months* against the winner, the question was, whether the defendant could be held to bail? the defendant's counsel comparing it to the case of actions upon penal statutes, where no bail is ever required. But the court held, there ought to be special bail in this case, which is at the suit of the party grieved, and wherein the defendant is a debtor to the plaintiff; and the clause is to be considered as remedial; and therefore, upon consideration, and talking with the other judges, special bail was ordered. *Turner v. Warren, Str. 1079.*

Bail upon the 9th of Ann. c. 14. against the winner.

In debt on the judgment, the defendant may be held to bail (*if no bail be given in the original action*), notwithstanding a writ of error be brought on the original action, and bail given on the writ of error. *Comy. Rep. 556.*

Defendant may be held to bail in debt on the judgment, if, &c.

In an action for double rent, on holding over, on 4 *Geo. 2. c. 28.* plaintiff may require special bail for the double rent, but then such rent must properly accrue due, as holding over or on notice if he does not quit, double rent shall be paid, &c.

Double rent.

Where Action is founded on a Judgment.

The debt was under 10*l.* but being increased (by *costs*) to more than 10*l.* on the taxation; the defendant

May be held to special bail in

was

debt on the judgment for damages and costs though original debt was under 10l.

was arrested on the judgment—*Motion for common bail*: Lord Kenyon said, as a different practice had prevailed in the different courts, that the judges of this court had consulted with those of the *common pleas*, the result was, that they had agreed to conform to the practice of the *common pleas*, by which a person under similar circumstances with defendant may be held to special bail. Rule disch. *Lewis v. Pottle*, 4 Term Rep. 570. Hil. 32 Geo. 3. (*Vide* 3 Burr. 1389. 4 Burr. 2117. 5 Burr. 2660. Cowp. 128. contra.) Black. Rep. 1274. S. P.

Insurance of tickets,

The defendant may be arrested on a statute which expressly authorizes an arrest; as for insuring lottery tickets, 27 Geo. 3. c. 1. *Vide* 1 Term Rep. 705. *Davis v. Mazzinghi*; 2 Term Rep. 614. as to the form of the affidavit.

Balance considered to be the debt in law as well as in equity.

Where there have been mutual dealings between the parties, the balance is considered as the debt in law, as well as in equity; and therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him, on the debtor side only, it would be looked upon as a mere evasion; and if not ground enough to support an indictment for perjury, would at least entitle the defendant to an action upon the case, for a malicious arrest. *Dr. Turlington's case*, 4 Burr. 1996.

In what Cases Defendant may be held to Bail a second Time.

The general rule is, when defendant has been once arrested, he cannot be arrested again for the same cause of action. *Nemo debet bis vexari pro eadem causa*.

If a second writ pending the first is taken out, common bail,

But where the defendant was arrested on a writ, pending the first cause, and wherein he had been previously arrested, the court said, the plaintiff had been too quick, for he should have had the costs taxed and paid before he took out the new writ, and discharged the defendant on common bail. *Belifante v. Levy*, 2 Str. 1209.

Where a man was held to bail in a second action pending first.

In a similar case, where it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant, and said the plaintiff was right in laying hold of him as he did, for had he discontinued before, the defendant would probably have run away, and therefore discharged the rule for common bail. *Olmus v. Delany*, Str. 1216.

After nonpross, defendant shall

Where the plaintiff is nonprossed for want of declaration, and he pays the costs, it was holden that he may again

again arrest the defendant, for he suffers enough by paying the costs, and therefore ought not to be in a worse condition than before. *Turton v. Hayes*, *Str.* 439.

The defendant was arrested on an illegal warrant, and ordered to be discharged. *6 Term Rep.* 123. *M. T.* 35 *Geo.* 3. The plaintiff discontinued the action, and held defendant to bail a second time. Motion to discharge him—The general rule, that a defendant cannot be held to bail twice for the same cause of action was admitted, but it was said, there was an exception from that rule when he was discharged the first time for some act over which the plaintiff had no control; and for which he was not answerable, which the court allowed; and discharged the rule. *Housin v. Barrow*, *6 Term Rep.* 218.

So where he misconceives his action, and moves to discontinue, and pays the costs, he may take out a new writ, and hold the defendant to bail *de novo*. *2 Wils.* 381. *Bates v. Barry*.

But where the bail had justified for 2334l. and the plaintiff not liking them, obtained the usual side-bar rule to discontinue, not disclosing that bail had justified; and then brought a *new action* on the same bonds, and laid the venue in *Middlesex* instead of *London*, made a fresh affidavit of the debt, and had the declaration marked by the clerk of the rules to charge him in custody, in order to detain him till the next term; on disclosing the matter by the clerk of the rules to the court, the court sent for the attorney, whose counsel cited the case in *Str.* 1216. as in point. The court at first hesitated what to do; but held it to be a trick and an unwarrantable conduct in the attorney, and that it should not have the intended effect, for he ought to have asked leave of the court to charge the defendant in custody, disclosing the whole of the case to them: and at first thought of making a rule to shew cause why the plaintiff should not be at liberty to do so. But at length they discharged the side-bar rule, which gave plaintiff leave to discontinue. So that the bail to the former action (who had justified) still remained liable to their recognizance. *Belchier v. Gansell*, *4 Burr.* 2502.

If there be a *non suit* on the merits, the plaintiff cannot arrest again, *aliter* on a slip or informality. Non suit.

If the defendant has been *superfeded*, by the plaintiff's laches, he cannot be arrested again. *Taylor v. Wasteneys*, If superseded.

Award.

If a draft be given by defendant to plaintiff where he said it would be paid immediately, and plaintiff discharges him out of custody; if such draft be not paid, may arrest him again on same affidavit.

neys, 2 Str. 1218. Nor in an action on the second judgment. *Chambers v. Robinson*, Ibid. 782.

But, where special bail was put in, and afterwards the cause referred by bonds of arbitration, and an award made above 10l. the defendant may be held to bail again in an action *on the award*, for the reference put an end to the first action. *Collins v. Powell*, 2 Term Rep. 756.

The defendant having been arrested for 80l. on a *testatum capias*, into Surry, gave plaintiff a draft for 45l. saying it would be paid immediately, and agreed to meet the plaintiff a few days afterwards, to settle the remainder of the debt, on which plaintiff agreed, that defendant should be discharged out of custody. The draft was dishonoured, the defendant having no effects in the hands of the drawer, on which defendant was again arrested on the same affidavit on a *testatum capias* in Middlesex, and moved to be discharged out of custody. Lord Kenyon: In cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given at all. *Rule disch. Puckford v. Maxwell*, 6 Term Rep. 52.

In what Actions Defendant cannot be held to Bail.

Where the defendant cannot be held to bail.

But where the damages are uncertain, as in covenant, where no money is covenanted to be paid, *trespass, assault, battery, conspiracy, assault and false imprisonment, slander* (except in slander of title), *actions against bail on the bail-bond, replevin-bond*, Salk. 99. *penal statutes* (unless expressly enacted), *malicious prosecution, action for crim. con. on bond for performance of covenants, debt on recognizance of bail*. The defendant cannot be held to bail of course.

Judge's order or rule of court.

In actions of *assault, imprisonment, scand. magn.* and other *personal wrongs*, in which it is apparent the damages will exceed 10l. the court, or any judge, on an affidavit of the circumstances, will give leave to the plaintiff to sue out a writ to hold defendant to special bail: But in these cases, it must be stated, that the defendant is going to quit the kingdom. *Sid. 307. Ray. 74. Lev. 39. N. on R. M. 8 Ann. 1 Salk. 99.*

ARREST.

III

In an action of debt upon judgment, whether *after verdict or by default*, the defendant cannot be arrested, if he was *previously held to bail in the original action*.

Debt on the judgment.

Say. Rep. 160. So in C. P. *2 Black. Rep.* 768. *Kendal v. Carey.* *6 Term Rep.* 757. *Collins v. Powell.*

Bail cannot be had in an action on the *second judgment*, where bail has been given on the first. *Chambers v. Robinson,* *2 Str.* 782.

Second judgment.

Nor can defendant be held to bail for a *penalty*, but only for the sum *secured by the penalty*. *Hatfield v. Linguard,* *6 Term Rep.* 217.

Penalty.

Of Persons not to be held to Bail in Civil Cases.

THE royal family, *2 Inst.* 50.; peers of the realm of England, and peeresses, as well by *birth* as by *marriage*, *1 Inst.* 131. *2 Inst.* 50.; peers and peeresses of Scotland, *5 Ann. c.* 8. art. 23.; *2 Str.* 990.; *Fort. Rep.* 165. (but this does not extend to *Irish* or other *foreign peers*, *2 Inst.* 48. or to *peeresses by marriage*, if they afterwards intermarry with commoners, *Co. Lit.* 16. *Dy.* 79.) are privileged.

If a woman who is noble by descent marry one that is under the degree of nobility, she remaineth noble still; but if she gain it by marriage, she loses it, if she afterwards marry under the degree of nobility. *Co. Lit.* 16. b.

By the law and custom of parliament members of the house of commons, *10 Geo. 3. c.* 50. not only during the actual sitting of parliament, but for a convenient time sufficient to enable them to come from, and return to, any part of the kingdom, before the first meeting, and after the dissolution of it; and also for 40 days after every prorogation, and before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than four-score days at a time, *1 Black. Com.* 165. are privileged. But this privilege does not hold in any of these three cases, *treason, felony, or breach of the peace.* *2 Wils.* 159. *Rex v. Wilks.*

Bishops, members of the convocation, and their servants, have the like privilege. *Stat. 8 H. 6. c.* 1.

By

By the law of nations declared by stat. 7 Ann. c. 12. ambassadors, and other publick ministers, are privileged from arrest. *Vide* 3 Burr. 1480. The reason of making this act. 1 Black. Com. 255. They must be ambassadors or publick ministers authorized, and received here, as such. Their servants must be *bona fide domestic servants*, and extends as well to the servants who are natives of the country where the minister resides, as to his foreign servants. 3 Burr. 1676. but it is not necessary they should lie in the house. Barn. 370. There must be a retainer, an office by name, and an actual service in that office. Black. 474. And a secretary of a foreign minister, though not immediately a domestic, is a servant within the statute. *Hopkins v. De Roebeck*, 3 Term Rep. 79. And where a person claims the benefit of the act, as domestic servant to a publick minister, he must shew that he really was servant at the time of the arrest, the general nature of his service, the actual performance of it, and that he was not a trader or object of the bankrupt laws. *Vide* 2 Str. 797. 2 Ld. Ray. 1524. Fitz-gib. 200. 1 Wils. 20. 78. 1 Black. Rep. 48. 1 Burr. 401. 3 Burr. 1478, 1676, 173. 3 Wils. 33. It is the law that gives the protection, and if he be not a *bona fide* servant, such minister shall not take him out of the custody of the law, or screen him from the payment of his just debts. 4 Burr. 2016.

Domestic servant.

Need not be registered.

Nor is it necessary to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office; though unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them. 7 Ann. s. 5. 1 Wils. 20. Although they may on motion be discharged. 3 Term Rep. 79. *Hopkins v. Roebeck*.

King's servants.

The king's servants are privileged from arrests, if they serve the king in his household, for their continual service and attendance upon the royal person of the king is necessary. 2 Inst. 631. 2 Keb. 3. Ray. 152. 8 Mod. 12. 5 Term Rep. 686. junior clerk of the king's kitchen, discharged out of custody in execution; marshal, warden of the Fleet, 1 Vent. 65.; clerks, attornies, and all other persons attending the courts of justice, 4 Inst. 72. 2 Inst. 551. 12 Mod. 163.; clergymen going to and returning from church, or performing divine

divine service therein, and not merely staying in the church with a fraudulent design, 50 *Edw. 3. c. 5.* 1 *R. 2. c. 16.*; suitors, *Bro. Privil. 57.*; witnesses subpœna'd, and other persons necessarily attending any court of record upon business, *Sir T. Raym. 101.* 1 *Vent. 11. Rules in Chan. 217.*; and the party himself, 2 *Black. Rep. 1113—1142. Str. 987. 1094.*; witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, 1 *Atk. 54.*; heirs, executors, or administrators, *R. M. 1654.*; sailor or volunteer soldier (unless the debt is twenty pounds), 1 *Geo. 2. c. 14. s. 15. 35 Geo. 3. c. 6. s. 65.* Also the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit, 2 *Roll. Abr. 273*; but the privilege the court allows their officers is restrained to those suits only, which they bring in *their own right*; for if they sue or be sued as executors or administrators, they then represent common persons, and are not entitled to privilege. *Hob. 177. Dyer 24. pl. 150. 2 Sid. 157. Latch. 190. Godb. 10.*

Witnesses.

Heirs, executors, or administrators.

When not allowed.

And though the servants of peers necessarily employed about their persons and estates could not formerly be arrested, 2 *Str. 1065. 1 Wilf. 278.*; yet this privilege seems to have been taken away by the statute, 10 *Geo. 3. c. 50. s. 2. 1 Black. Com. 155.*

Servants of peers.

Members of corporations aggregate, and hundredors, not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. *Bro. tit. Corp. 43. 3 Keb. 126, 7.*

Corporations.

Also if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor entitled to the attachment which the court grants against its own officers. 2 *Roll. Abr. 274.*

When privilege discharged.

In case a bankrupt shall be arrested coming to surrender, or after his surrender shall be arrested within 42 days, that then on producing the summons, or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if detained, such bankrupt shall have for his own use, five pounds for every day he is detained. *Stat. 5 Geo. 2. c. 30. s. 5.*

A bankrupt privileged for forty-two days.

The bankrupt must, to protect himself from arrest, make an actual surrender, (which may be the first public

To protect him;

lick meeting after he has been declared bankrupt, (for before actual surrender, at a public meeting, he is not protected,) because the sooner he does it, the better for his creditors. Therefore the court held, that a bankrupt coming from *Holland* to surrender on the forty-second day, and his time enlarged, he did not do so on the forty-second day, that the arrest was good. *Kenyon v. Solomon*, *Cowp. Rep.* 156.

If the wife be arrested.

In an action against *husband and wife*, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife. *1 Vent.* 49. *1 Mod.* 8.; and if she be arrested, she shall be discharged on common bail. *1 Term Rep.* 486. *Edwards v. Rourke & ux.*

But there are cases in which a *feme covert* may be arrested. As if the coverture be not open and notorious; or if she has imposed on plaintiff in passing for an unmarried woman. *Black. Rep.* 903. *Pearson v. Meaden*. Or if she live notoriously in a state of separation, and the like. *Corbet v. Poelnitz*, *1 Term Rep.* 5.

Bail to the sheriff cannot be held to bail.

If bail enter into a bond for *A.* conditioned for his appearance at the return of the writ, although the officer pay the money for non-appearance, and the bond be assigned to such officer by the sheriff, such bail cannot be held to bail, for money paid for the performance of the condition of the original bond, entered into by the defendant. And *Lord Kenyon* said, the practice of the other courts was, that a person who has become bail for another cannot himself be held to bail. The sheriff is to have solvent persons, and it was not necessary he should be armed with this compulsory process against the bail. *Brander and another v. Robson*, *6 Term Rep.* 336.

If a married woman obtain credit on pretence of being single.

Where a married woman applied to borrow money of plaintiff who objected, and said it was rumoured she was a married woman, *which she denied*, and in consequence lent her the money, after arrest, the court refused to discharge her on common bail, although she annexed a copy of her register of marriage to her affidavit. *5 Term Rep.* 194. *Partridge v. Clarke*.

Affidavits.

IF the action be such as to *require special bail*, and the plaintiff means to *arrest defendant*, the *first* thing to be done is, to make an affidavit of the true cause of action.

An affidavit signifies, in law, an oath in writing; and to make affidavit of a thing, is to testify it upon oath. An affidavit, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath; and the true place of *habitation*, and true *addition* of every person who shall make an affidavit, is to be inserted therein, 1 *Lill. Abr.* 44. 46. It ought to set forth *matter of fact only*, which the party intends to prove by his affidavit, and not to declare the merits of the cause, of which the court is to judge.

Affidavit,

What it is to contain,

And must set forth the *matter positively*, and all *material circumstances* attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New Ab.* 66.

The stat. 12 *Geo. 1. c. 29.* requires the cause of action to be *sol.* to hold to special bail; and both the statute and the established rules of the court require a *positive oath* to be made of the debt, and not couched in words of reference (except in the case of assignees, executors, &c.), 1 *Term Rep.* 83. and they must swear as to their belief of the debt.

The affidavit must be *filed* before or at the time of *suing out the writ*, or the court will discharge the party from the arrest, on filing common bail.

To be filed,

It is not sufficient for a plaintiff to swear positively to a debt, without shewing also the *nature of that debt*. *Jacks v. Pemberton*, 5 *Term Rep.* 552.; although the circumstances be long and complicated, and although the ground of the demand cannot be set forth without stating the *whole substance of the declaration*. *Cope v. Coke*, *Dougl.* 467.

The nature of the debt to be shewn; although it be the substance of the declaration.

It should be *clear, certain, and correct*, and such an oath as a *perjury can be assigned upon*.

The judges of the court of C. B. and the barons of the exchequer have been consulted, and they all agree, that they never *knew* of its being the practice in their courts,

One defendant to be put in one affidavit in a separate action.

that more than *one* defendant should be inserted in the same affidavit. If in fact such a practice has prevailed, it has been without their sanction or knowledge. They all disapprove of it, and consider it as contrary to the meaning of the acts, 12 Geo. 1. c. 29. 5 Geo. 2. c. 27. 21 Geo. 2. c. 3. and a fraud upon the stamp duties. This means in *separate* actions; *Lord Mansfield. Gilby v. Lockyer, Dougl. 217. T. 19 Geo. 3. 5 Burr. 2690.* where debt on bond, and assumpsit, was in one affidavit, and defendant discharged. *Crooke v. Davis.*

Who may make the affidavit of the debt.

An affidavit of the cause of action may be made by the *plaintiff, his wife, or a third person*, who knows of the debt being contracted, and can swear that it is still due, and may be sworn before the plaintiff's attorney if he be a commissioner. *Rule E. 15 G. 2.* But it must be sworn by some person *who is competent to be a witness*; and therefore it is bad if made by a person convicted of felony. 5 Mod. 74. 2 Salk. 261.

Cannot join debt and case in one stamp;

If the plaintiff joins *debt and assumpsit* together in one affidavit, the court will discharge defendant: in this case, the court did not seem to lay much stress on the objection of its being a fraud on the stamp duty. 5 Burr. 2690. *Crooke and another v. Davis.*

Two defendants in different actions,

Two or more defendants in *different* actions, cannot be held to bail upon one affidavit: formerly otherwise. *Dougl. Rep. 217. Gilby v. Lockyer.*

By *stat. 29 Car. 2. c. 5. s. 1.* The judges, &c. of the courts at *Westminster*, by commission, may empower persons in the several counties of *England*, to take affidavits concerning matters depending in their several courts.

Affidavit may be made before a commissioner or plaintiff's attorney, &c.

Ordered, that all affidavits of any cause of action before process sued out to hold defendants to bail, may be sworn before any commissioner authorized to take affidavits in this court; although such commissioner be concerned as attorney for the plaintiff. *R. E. 15 Geo. 2. 1742.* And it may be made before any judge of the court, or before the *officer who issues the writ, or his deputy*: for which affidavit one shilling is to be paid above the stamp duties, and to be filed with such officer, or his deputy. *Ibid. Reg. 3.*

is. to be paid.

The court will not receive a supplemental affidavit.

To be ingrossed on 2s. stamp paper. Where there is a good cause of action, and a proper affidavit, the defendant may be held to bail, and the court will not go out of the affidavit, or prejudice the cause,

cause, by entering into the merits upon which it is founded. 1 *Salk*. 100. The plaintiff, therefore, must stand or fall by his affidavit; it being the constant and uniform practice, not to receive a *supplemental* or *explanatory* affidavit on the part of the plaintiff in this court, nor a *counter* or *contradictory* one, on the part of the defendant. *Heathcote v. Gosling*, 2 *Str.* 1157. 1 *Wils.* 335. *Emerson v. Hawkins*. 5 *Term Rep.* 552. *Jacks v. Pemberton*. *Dougl.* 467. *Cope v. Cooke*.

A plaintiff who sues for penalties under the lottery-act, 27 *Geo.* 3. c. 1. s. 2. must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties sued for, and that amount must be specified in the first process issued, viz. The bill of *Middlesex* or *latitat*, and whether the defendant be held to bail or not. *King qui tam v. Horne*, 4 *Term Rep.* 349.

The act is, that upon every suit, action, bill, &c. a *capias*, or other writ, shall and may issue; the first process specifying therein the amount of the penalties sued for, whereof an affidavit shall be first made and filed.

There is no distinction in the act between *bailable* writs, and those that *are not so*.

Affidavit to be made previous to the action brought on 27 *Geo.* 3. c. 1.

In what Cases the Affidavit is not sufficient.

If the affidavit be, that defendant borrowed 2000*l.* of plaintiff on bottomry, which money is now due and owing to plaintiff by virtue of said bond, *as thereby may appear*, it is not sufficient, for the money may be paid and not appear. *Str.* 1157. *Heathcote v. Gosling*.

Affidavit as appears on bond, not good.

The plaintiff made oath of his debt before a burgo-master in *Holland*, who certified an account thereof to the plaintiff's agent here, who makes an affidavit that he believes the said oath and account current are true, and defendant was held to bail: common bail was ordered: for a *positive affidavit* is always required, and affidavits going only to belief, are insufficient. *Van Morsell v. Julian*, 1 *Wils.* 231.

There must be a positive affidavit to hold to bail.

That defendant was indebted to him in such a sum as appears by agreement bearing date such a day. Common bail ordered. *Jennings v. Martin*, 3 *Burr.* 1447. For the affidavit is only couched in terms of reference. *Vide* 1 *Burr.* 655. *Pomp v. Ludvigson*, the like resolution.

As appears by agreement.

According to bill delivered.

That defendant is indebted to plaintiff "in 20l. according to the bill delivered by the plaintiff to the defendant," is insufficient. *Williams v. Jackson*, 3 Term Rep. 575.

Merchant.

Affidavit by a merchant in London, the defendant owes plaintiff so much, as appears by plaintiff's affidavit made in Amsterdam, which deponent believes to be true, not sufficient. *Str.* 1209. *Rios v. Belifante*.

Third person.

Affidavit by a third person, that defendant is indebted to plaintiff, as appears by account, or by bill and indorsement, or bond, under defendant's hand, not sufficient. 1 *Wilf.* 121. 279. *Rollin v. Mills*.

On agreement to pay balance, the affidavit should specify the balance due, and not hold to bail for the whole sum.

That defendant was indebted in 4720l. and upwards, under and by virtue of a certain agreement in writing, bearing date, &c. entered into between deponent and defendant, whereby the defendant undertook and engaged, that he together with A. and B. should pay or discharge on or before, &c. the balance of all subsisting accounts between them, which said balance is still due and unpaid to deponent. *Cur.* The plaintiff should have shewn, what the balance was, and have sworn, that, that was still due and unpaid; whereas, he has sworn to the whole sum, which was inserted as a penalty for securing the balance: An affidavit to hold to bail must be positive and certain, and not merely argumentative. *Hatfield v. Linguard*, 6 Term Rep. 217.

But affidavit that defendant is indebted to plaintiff in 10l. as he computes it, is sufficient. 2 *Burr.* 1032. *Moulty v. Richardson*.

As appears by the bill, not good.

On affidavit that the defendant is indebted to the plaintiff Rollin in a certain bailable sum of money, by virtue of a bill of exchange, indorsed by the payee for the plaintiff, as appears by the said bill and indorsement, and that Mills the defendant accepted the bill, but had refused payment, that the bill was protested, and though the affidavit was positive that the defendant had accepted the bill, court ordered common bail, because the affidavit only swears that the defendant is indebted, as appears by the said bill. *Rollin v. Mills*, 1 *Wilf.* 279.

Book-keeper,

So if made by plaintiff's book-keeper, that he was indebted in 3400l. as deponent verily believes. *Str.* 1226. *Claphamson v. Bowman*.

On lottery-act, should specify nature of the offence.

An affidavit to hold to bail on the lottery-act, 27 Geo. 3. c. 1. should specify the nature of the offence, and

and aver that the defendant has incurred the forfeiture: but the offence need not be described circumstantially; nor is the plaintiff obliged to swear that the defendant is indebted to him to the amount of the penalty, because any other informer might previously have commenced the action. *Davis v. Mazzinghi*, 1 Term Rep. 705.

If the act be misrecited in the affidavit, it will be bad, as calling it an act passed in the 27 Geo. 3. when it passed in 22 Geo. 3. But the party is not bound to set forth the year at all when the act passed. 2 Term Rep. 654. *Watson v. Shaw*.

An affidavit to hold to bail, stating a promise made by the defendant's executor, &c. to pay a legacy of 100l. bequeathed by his testatrix, and confessing assets to the amount of 280l. but that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant is justly indebted to the plaintiff in 100l. for the reasons herein before mentioned. Court held that an affidavit to hold to bail must be *positive*, and nothing ought to be left to be collected by *inference*. It should have stated in addition, *that the sum is still due and unpaid*.

Mr. Justice Buller.—The court is so strict in construing affidavits to hold to bail, that in one instance they held an affidavit, “that the defendant was indebted to the plaintiff in 5000l. for money had and received, and for which he had not accounted,” to be insufficient, which was a much stronger case than the present; and, if I am not mistaken, the case which was cited at the bar has since been over-ruled. An affidavit to hold to bail must be as strong and positive as an affidavit to change the venue. The cases of assignees, &c. are exceptions. *Mackenzie v. Mackenzie*, 1 Term Rep. 716.

On an affidavit that the maker and indorser of a promissory note are indebted to the holder, neither can be held to bail. *Hussey v. Wilson*, 5 Term Rep. 254.

Nor if it state, that on such a day the plaintiff gave defendant notice to quit on, &c. and that the latter held over notwithstanding, by reason of which and by force of the statute an action had accrued to plaintiff to recover from defendant 108l. &c. *Per Curiam*:—The affidavit does not state positively defendant is indebted in so much, it is only argumentative. *Wheeler v. Copeland*, 5 Term Rep. 364.

If act be misrecited.

An affidavit stating promise by executor, should say, debt is still due, &c.

4 Burr. 21:6.

2 Burr. 1032.

Maker and indorser in one affidavit.

If affidavit be argumentative only.

An

As appears by
master's allocatur.

An affidavit to hold to bail, that defendant is indebted to the plaintiff in a certain sum, "*as appears by the master's allocatur,*" is not sufficiently positive, because he should have sworn, "*the debt is still due.*" *Powell v. Portherch*, 2 Term Rep. 55.

Indebted in, &c.,
and for which defendant promised
to be accountable,
insufficient.

That defendants are indebted to plaintiff in 245l. 5s. for money lent by plaintiff to defendants, for the use of another, and for which defendants promised to be accountable, and to repay or cause to be paid, or secured to plaintiff in three days from the day of plaintiff's so advancing and lending the same. This affidavit is defective. *Jacks v. Pemberton*, 5 Term Rep. 552.

In what Cases it is sufficient where the Plaintiff sues as Assignee, Executor, &c.

Assignee of bond.

Where an assignee of a bond swore that the obligor was indebted in 90l. for principal and interest, as he believed, this was held sufficient. *Loveland and Bassett*, 1 Wils. 232.

Executor.

If an executor swears to the books of the testator, and that he believes them to contain a true account, and that the debt is still unpaid, it is sufficient to hold to special bail. But an affidavit by an executrix, that the defendant was indebted to her testator (so much) as appears by the books of her testator, was held insufficient. *Str.* 1219. *Walrond v. Fransham*.

An executor, &c.
in his affidavit
must swear as to
his belief, to
hold to bail.

In the case of *Sheldon*, executor, v. *Baker*, Mr. J. Buller said, The general rule is, that there must be a positive affidavit: the cases of assignees, executors, &c. are by way of exception to that rule; then a party claiming under that exception must shew a case where it has been allowed. In those cases, if he swears that "*he believes it to be true,*" this is as much as he can do, because the transaction in general does not come within his own knowledge. But there is no case where the affidavit has been allowed to be sufficient to hold the defendant to special bail, without adding *the belief of the party who made it*. The affidavit was, "*indebted to him as executor for money had and received by defendant as receiver of the rents, and as appears to deponent to be the true balance upon the stewardship account by him delivered to this deponent, and from the several articles of disbursement therein contained.*" He ought to have said, that he believed the account to be true; therefore held insufficient. 1 Term Rep. 84.

If

If assignees swear that defendant is indebted, *as appears to them by the last examination of the bankrupt, as they believe, and that they have not received the debt, or any part of it, and that they believe it to be still due, it is sufficient.* 4 Burr. 1992. *Barclay, assign. v. Hunt.*

If there be two or more assignees of a bankrupt, and one only make the affidavit of the debt being due, it will be sufficient, for the consequence of not allowing it to be good, would be to prevent the assignee arresting defendant at all, unless the other would assist him.

Assignees.

An affidavit of debt by one assignee of bankrupt, sufficient.

Swayne & al. v. Crammond, 4 Term Rep. 176.

The affidavit on the lottery-act, 22 Geo. 3. c. 47. alleged, that defendant had promised and agreed to pay to several persons by name, divers sums of money, on certain events and contingences, relating or applicable to the drawing of certain tickets or numbers, &c. without adding, that defendant *had taken and received any money in consideration of such promises, was held good.* *Holland qui tam v. Bothman, 4 Term Rep. 228.*

Lottery-act.

Where the Court have staid the Proceedings on the Lottery-Act.

As an affidavit hath been held necessary to be made previous to the issuing a writ for penalties under 27 Geo. 3. c. 1. s. 2. and specifying the amount of those penalties, in consequence many actions were brought, and the present plaintiff filed one affidavit in order to hold the four defendants to bail, and after sued one writ against all, but declared separately, as for separate offences. Defendants put in bail. A rule was obtained, *why the writ should not be quashed*, because the affidavit, which is the first step to be taken under the 27 Geo. 3. c. 1. s. 2. and without which the writ cannot be sued out, cannot be supported. The objection was that each defendant was obliged to take a copy of the whole affidavit, whereas three fourths of it do not relate to him; and that the office copy was necessarily stamped with four stamps, when one would have been sufficient, if the affidavit had affected only one defendant. *Per Cur.* This case comes within the above statute, which speaks of such penalties against certain former acts, as touch and concern lotteries. If so, it was necessary that there should be an affidavit previous to the suing out of the writ. This affidavit cannot be supported

Where several have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be made and filed against each of them, and if they be all joined in one affidavit, the irregularity is not waived by putting in bail; but the court will stay proceedings against all.

ported for the reasons urged by the defendant's counsel; they are not to be harassed with the unnecessary expence of taking copies of those parts of the affidavits, which relate to offences not imputed to them individually. From this, it necessarily follows, that the writ must be quashed, because the words of the act are *positive*, that no process shall be sued out *until an affidavit has been first made and filed*. And though in ordinary cases, a party may waive taking advantage of any trifling irregularity in the mode of proceeding, by not objecting in the *first* instance; the defendants in this case, could not waive this objection, because the court are to take care that an action on a penal statute shall not be commenced in a mode prohibited by that statute. *Rule abs. Goodwin qui tam v. Parry, 4 Term Rep. 577.* It was stated in the shewing cause, that defendants had *waived* taking advantage of it, by *putting in bail*.

Affidavits.

New rule.
All affidavits taken by illiterate persons must be read and expressed in the jurat by the commissioner.

Ordered, that where any affidavit is taken by any commissioner of this court made by any person, who from his or her signature appears to be *illiterate*, the commissioner taking such affidavit shall certify or state in the jurat, *that the affidavit was read in his presence, to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit.* R. E. 31 Geo. 3.

Need not intitle affidavit.

It is now determined, that it is *not* necessary in an affidavit to hold to bail to intitle it in the cause, or in the K. B. *Adams v. Pinfold, E. 34 Geo. 3.* So in C. P. *Adams v. Aspfeld the Elder, S. T.* But upon motion, both must be stated.

In the King's Bench.

For work done and materials found.
Every tradesman's bill for work done may be included in this affidavit.
For goods sold and delivered.

John Doe, of Milk-street, Cheap-side, London, taylor, maketh oath and saith, That Richard Roe is justly indebted unto this deponent in 20l. for work and labor by this deponent done and performed for the said Richard Roe, and for materials found.

John Doe, of Milk-street, Cheap-side, London, ware-houseman, maketh oath and saith, That Richard Roe, is justly indebted unto this deponent in 10l. and upwards, for goods sold and delivered.

John

John Doe, of, &c. maketh oath and faith, That *Richard Roe* is justly indebted unto this deponent in 100l. for money lent and advanced at his request.

For money lent.

For money by this deponent laid out, expended, and paid, for the said *Richard Roe* at his request.

For money laid out.

For money had and received to and for the use of this deponent.

For money had and received.

Indebted unto this deponent in 100l. on an account stated.

Upon an account stated.

For the work and labor by this deponent done for the said *Richard Roe*, and for materials found therein, and for goods sold and delivered to the said *Richard Roe*, and also for money by this deponent laid out, expended, and paid, and for money lent and advanced, and also for money by the said *Richard Roe* had and received to the use of this deponent.

For work done and materials found, goods sold and delivered, money laid out, lent, and money had and received.

John Denn, of, &c. woollen-draper, maketh oath and faith, That *Richard Fenn* is justly indebted to this deponent and his partner *Richard Roe*, in 100l. for goods sold and delivered.

For goods sold and delivered by partners.

The plaintiff's servant, if he knows of the debt being contracted, may (in the absence of the master) make affidavit of the debt being due to plaintiff, which will hold defendant to bail; then the affidavit will run thus:

Servants.

Joseph Lamb, servant to *Richard Fenn*, of *Newgate-street, London*, leatherseller, maketh oath and faith, That *John Denn* is justly indebted to the said *Richard Fenn*, in 40l. for goods sold and delivered, and for work done by the said *Richard Fenn*.

For goods sold and delivered, made by a servant.

If the work be done by a carpenter, coachmaker, or any other trade, wherein servants and carriages are employed, the affidavit may be thus (though in point of law all is supposed to be done by the master, and may be so laid in the declaration):

For work and labor done and performed by this deponent and his servants (with his horses, carts, and carriages; if that be the fact), for the said *John Denn*.

For work done by the plaintiff and his servants, &c.

For the hire of divers horses, mares, and geldings of this deponent, by him this deponent let to hire to the said *John Denn*, and at his request.

For the hire of horses.

For the work and labor of this deponent as a surgeon, by him done and performed in and about the healing and curing of the said *John Denn* of divers wounds,

For work done as a surgeon, and for medicines.

wounds, and also for divers medicines, potions, and plaisters, by this deponent found and provided for the said *John Denn*, at his request.

For medicines found as an apothecary.

For divers medicines, and other things, found and provided, administered and applied, to the said *John Denn*, by this deponent as an apothecary, and also to his family at his request.

For depasturing of cattle.

For feeding and depasturing of divers cattle of the said *John Denn*, at his request, for the space of six weeks, now elapsed.

For the use and occupation of a house and land.

For the use and occupation of a certain messuage, and divers acres of land, with the appurtenances, situate in the parish of *West Wycomb*, in the county of *Bucks*, for one year, now elapsed.

The like of a messuage.

For the use and occupation of a certain messuage, with the appurtenances situate in *Frith-street, Soho*, in the county of *Middlesex*, held by the said *John Denn* of this deponent, for the space of one year now elapsed.

For part of a messuage.

For the use and occupation of certain rooms and apartments, part and parcel of a certain messuage of this deponent, situate in *Fleet-street, London*, held and enjoyed by the said *John Denn*, for the space of half a year, now elapsed.

For arrears of rent due on a lease.

For certain arrears of rent, due and owing from the said *John Denn* to this deponent, for the use and occupation of a certain messuage or tenement with the appurtenances, situate and being in the parish of *St. Bride's, Fleet-street, London*, demised by this deponent by indenture of lease to the said *John Denn*.

For a gelding sold.

For a gelding sold and delivered by this deponent, to the said *John Denn* at his request.

For meat, drink, washing, &c.

For meat, drink, washing, lodging, and other necessities, by this deponent found and provided, for the said *John Denn* and his family, at his request.

To hold an administrator to bail on a devastavit returned by the sheriff.

A. B. of, &c. maketh oath and saith, That *C. D.* is indebted unto this deponent in the sum of 20*l.* by virtue of a certain judgment by default recovered by him against the said *C. D.* as the administrator of *J. K.* deceased, in Hilary term last past; and to a writ of *fieri facias* upon which said judgment, the sheriff hath returned *nulla bona* and a devastavit by the said *C. D.* of the effects of the said deceased, to the amount of the said 20*l.* Vide *Comb.* 206.

Notes

Notes of Hand.

John Denn, of *Burford*, in the county of *Oxford*, farmer, maketh oath and faith, That *Richard Denn* is justly indebted unto this deponent in 50l. as the drawer of a promissory note, payable to this deponent, or order, at a day now past (or on demand).

Drawee against the drawer.

On a promissory note, drawn by the said *Richard Fenn*, payable to one *A. B.* or order, and by him indorsed to this deponent.

Indorsee against drawer.

Is justly indebted unto this deponent in fifty pounds, as indorsee of a promissory note of hand, indorsed to this deponent, payable at a day now past.

Indorsee against the indorser.

Is justly indebted unto this deponent in 50l. upon a promissory note drawn by the said *Richard Fenn*, payable to this deponent, or order, for 100l. at a day now past.

On a note where part has been paid, drawee against the drawer.

A. B. of, &c. (being one of the people called *Quakers*), solemnly affirms, That *C. D.* is justly indebted unto this affirmant in 20l. on a promissory note, drawn by the said *C. D.* payable to this affirmant, or order, at a day now past.

Quaker's affirmation.

Bills of Exchange.

A. B. of, &c. grocer, maketh oath and faith, That *C. D.* is indebted to this deponent in 70l. as the acceptor of a bill of exchange, payable to this deponent, or order, at a day now past.

Drawee against acceptor.

Maketh oath and faith, That *John Denn* is justly indebted to this deponent in 100l. as the drawer of a bill of exchange, payable to this deponent, or order, at a day now past.

Drawee against drawer.

Maketh oath and faith, That *C. D.* is justly indebted to this deponent in 70l. on a bill of exchange, drawn by the said *C. D.* on one *J. K.* payable to his own order, and by the said *C. D.* indorsed to this deponent, payable at a day now past.

Indorsee against the drawer, when payable to his own order.

That *C. D.* is justly indebted to this deponent in 70l. on a bill of exchange, indorsed by the said *C. D.* to this deponent, and payable at a day now past.

Indorsee against an indorser.

A. B. of, &c. maketh oath and faith, That *C. D.* now hath, or lately had, in his possession divers goods and chattels of this deponent's, of the value of 100l.

In trover for goods.

Trover for a
promissory note.

100l. which he hath refused to deliver to this deponent, and hath unlawfully converted the same to his own use.

That *C. D.* hath, in his possession, a certain promissory note of hand of this deponent's, bearing date the 5th day of *June* 1783, whereby one *A. B.* six weeks after the date thereof, promised to pay to this deponent, or order, 40l. for value received; and which said promissory note the said *C. D.* hath refused to deliver up to this deponent, and hath unlawfully converted the same to his own use.

The like for a
bond.

That *C. D.* hath, in his possession, a certain bond or obligation of this deponent's, bearing date the 5th day of *January* 1783, entered into by one *J. K.* to this deponent, in the penal sum of 400l. conditioned for the payment of 200l. as therein mentioned; and which said bond the said *C. D.* hath refused to deliver to this deponent, and hath unlawfully converted the same to his own use.

What affidavit
is sufficient.

An affidavit in trover, "*That the defendants have possessed themselves of divers goods belonging to the plaintiff of the value of 20l. and have refused to deliver them up; and that they or some of them have converted and disposed of them to their own use,*" is sufficient to hold to bail. *Cowp. Rep. 529. Charter v. Jacques.*

The like for
deeds generally.

That *C. D.* hath, in his possession, divers deeds and writings of this deponent, of the value of 400l. and which deeds and writings the said *C. D.* hath refused to deliver up to this deponent, and hath unlawfully converted them to his own use.

In detinue.

That *C. D.* holds and unjustly detains from this deponent a certain indenture of lease, bearing date the 4th day of *January* 1783, made between *C. D.* of, &c. of the one part, and *A. B.* of, &c. of the other part, and which said indenture is of the value of 20l. and upwards to this deponent, who hath demanded the same.

On Bond.

On a bond:

J. K. of, &c. hofier, maketh oath and faith, That *C. D.* is justly indebted unto this deponent in 100l. and upwards, for principal and interest due on a bond, bearing date the 4th day of *May* last past, entered into by the said *C. D.* to this deponent, in the penal sum of 200l. conditioned for the payment of 100l. and lawful interest for the same.

J. D. of, &c. gentleman, maketh oath and faith, That C. D. did, by his bond, bearing date the 3d of February last past, become bound unto A. B. of, &c. mercer, in the penal sum of 200l. conditioned for the payment of 100l. and lawful interest, on a certain day now past, and which bond is now in the custody of this deponent. And this deponent further saith, That the said A. B. did, by indenture, bearing date the day of last past, assign, transfer, and set over the said bond unto him this deponent, and all monies due and owing thereon, for a valuable consideration then paid by this deponent to the said A. B. And this deponent further saith, That he hath not received any part of the said 100l. or the interest thereof due on the said bond; nor hath the said A. B. to the knowledge or belief of this deponent, received the said 100l. or any part thereof, or the interest thereof, since the said assignment; and that the said C. D. is now justly indebted unto this deponent, as assignee as aforesaid, in the sum of 102l. 10s. for the principal and interest due upon the said bond. Some practisers think *the obligee* should join in this affidavit with the assignee; but I find in 1 *Wils.* 232. in *Loveland and Bassett, Trin.* 16. *Geo.* 2. where an assignee of a bond swore, that the obligor was indebted in 90l. for principal and interest upon the bond, as he believed, was held sufficient to hold to special bail. — *Cur.* said, As the assignee had the bond in his own custody, it was of itself some evidence of the debt; and the presumption must be, that it was not paid, as the bond was not cancelled or given up to the obligor.

On an assignment of a bond, made by the assignee.

Observation,

A. B. of, &c. and C. D. of, &c. severally make oath and say; and first, this deponent A. B. for himself saith, that G. H. did by his bond, bearing date the 3d day of February 1790, become held and bound unto this deponent in the penal sum of 200l. conditioned for the payment of the sum of 100l. together with lawful interest for the same, on a day now past. And this deponent further saith, that he did by indenture, bearing date the day of last past, assign the said bond, and all monies due thereon, for a valuable consideration paid to this deponent, unto the other deponent C. D. And this deponent hath not received the said 100l. or any part thereof, or the interest thereof, from the said G. H. either before, or since the said assignment.

The like where the obligee joins with the assignee.

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signment. And this deponent *C. D.* for himself saith, that the said *G. H.* is justly indebted unto this deponent, as assignee as aforesaid, in 10*l.* for the principal and interest due on the said bond.

Affidavit for money due on a judgment.

A. B. of, &c. mercer, maketh oath and saith, That *C. D.* is justly and truly indebted unto this deponent in 30*l.* on and by virtue of a judgment recovered by this deponent in this honorable court, against the said *C. D.* as of *Easter* term last past; and also in the further sum of 5*l.* for his costs taxed thereon.

On an annuity bond.

A. B. of, &c. grocer, maketh oath and saith, That *C. D.* is indebted unto this deponent in pounds, for the arrear of a certain annuity due to this deponent, upon and by virtue of a bond, bearing date the day of 1794, entered into by the said *C. D.* to this deponent, in the sum of pounds, conditioned for the payment of the sum of pounds a year, for the life of the said *C. D.* to this deponent.

By one assignee of a bankrupt. Vide p. 127.

A. B. of, &c. maketh oath and saith, That *C. D.* is indebted unto this deponent and *J. M.* as assignees of the estate and effects of *J. K.* a bankrupt, in 20*l.* for goods sold and delivered, as appears by the bankrupt's books delivered to this deponent, and which sum this deponent verily believes to be due from the said *C. D.* to the estate of the said bankrupt.

By an executor, for goods sold and delivered.

J. K. of, &c. grocer, executor of the last will and testament of *A. B.* deceased, maketh oath and saith, That *Richard Roe* is justly indebted unto this deponent, as executor as aforesaid, in 50*l.* for goods sold and delivered by the said *A. B.* in his lifetime, as appears by the books of the said *A. B.* and which sum is now due from the said *R. R.* to the estate of the said *A. B.* as this deponent verily believes.

Upon a note by an executor.

Upon a promissory note given by the said *R. R.* to the said *A. B.* in his life-time, as he believes, and as appears to this deponent by the note in his custody, and which said sum is now due to this deponent as executor as aforesaid, as he verily believes.

To hold to bail for an assault.

In order to hold a defendant to bail for an assault, an affidavit must be prepared, and laid before a judge, which is to be ingrossed on a 2*s.* stamp paper, and sworn before him; if he approves thereof, he will make an order to hold the defendant to bail, and it may be as follows:

J. G.

Affidavit to hold
to bail for an
assault.

J. G. of, &c. the plaintiff, and *J. W.* of, &c. surgeon, severally make oath and say: And first this deponent *J. G.* for himself saith, That in the month of *January* last past, the above named *W. F.* made an assault upon this deponent, and did beat and kick this deponent in so violent a manner on his groin, and other parts of his body, that this deponent has ever since that time been in great pain; and this deponent has at this time a rupture in his right groin, descending into the *scrotum*, occasioned by the kicks and blows which this deponent received from the said *W. F.* whereby this deponent is rendered utterly incapable of getting his livelihood. And this deponent further saith, That, to the best of his knowledge, he never was subject to, nor had a rupture, before the said assault was made upon him this deponent as aforesaid; and that the said kicks and blows given him by the said defendant, are the sole cause of the said rupture. And this deponent further saith, That he has applied to several eminent surgeons for advice to be cured of the said rupture, but has been informed by them that the same is incurable. And this deponent further saith, That he knows and is well acquainted with the defendant, and that the said defendant is in very good circumstances. And this deponent further saith, That he believes the said *W. F.* soon intends leaving this kingdom, and has not made this deponent any satisfaction for the said assault. And this deponent *J. W.* for himself saith, that he hath viewed the other deponent's right groin, and that he has got a rupture in his said right groin descending into the *scrotum*, which in this deponent's opinion is incurable, and renders him utterly incapable of following his business.

Maketh oath and saith, That *A. B.* fourth mate of the ship called *N. J. P.* commander, on the 1st day of *February* 1791, came to this deponent in the steerage of the said ship at *B.* in the *East-Indies*, and without any just cause or provocation whatsoever, given to or intended to be given to him, by this deponent, laid hold of this deponent's collar, and dragged this deponent on the floor thereof, and with his fist, did with great force and violence strike this deponent many blows on his head, face, and body, by which this deponent lay senseless for some time; and the said *A. B.* would have again beat this deponent, had he not been prevented by a person on board the said ship. And this deponent further

Another,

ther saith, That his right cheek became greatly swollen and discoloured, and that he was in great pain for a considerable time afterwards; and this deponent was rendered wholly incapable of performing his business on board the said ship. And this deponent further saith, That the said *A. B.* hath not made any satisfaction for the said assault, although he is in good circumstances; and he believes that the said *A. B.* soon intends leaving this kingdom.

Mesne profits.

In an action for the *mesne profits* after recovery in ejectment, a judge may order *special* bail, if he thinks proper, on an affidavit of the amount of the damages; but it cannot be done without.

For not delivering of goods pursuant to a bill of lading.

J. B. of, &c. maketh oath, That *C. D.* is justly indebted unto this deponent in 270*l.* being the value of one parcel of merchandize received by the said *C. D.* on board a ship or vessel called the *Swift*, whereof the said *C. D.* was commander; and for which the said *C. D.* as appears to this deponent, and as this deponent verily believes, signed or subscribed a bill of lading, bearing date the 16th day of *January* last, thereby undertaking to deliver to this deponent, or his assigns in *London*, the said parcel of merchandize, which the said *C. D.* hath not delivered; although the said ship hath long since arrived in the river of *Thames*.

On a bond made in Scotland.

In the sum of 150*l.* on and by virtue of a certain instrument in writing, made according to the laws of the kingdom of *Scotland*, and there called a bond.

Against an underwriter on a policy.

In 90*l.* for an average loss on the said *C. D.*'s subscription of the sum of 100*l.* as an underwriter on this deponent's interest in goods shipped on his own proper account, in the ship *J. N. F.* late master, on her late voyage from *London* to *New York*, in the prosecution of which said voyage, the said vessel and the greatest part of her cargo were lost.

The COUNTIES of ENGLAND.

Bedfordshire
Berkshire
Buckinghamshire
Cambridgeshire
Cheshire, C. Pal.
Cornwall

Cumberland
Derbyshire
Devonshire
Dorsetshire
Durham, C. Pal.
Essex

Glou.

Gloucestershire	Nottinghamshire
Hampshire	Oxfordshire
Hertfordshire	Rutlandshire
Herefordshire	Shropshire
Huntingdonshire	Somersetshire
Kent	Staffordshire
Lancashire, C. Pal.	Suffolk
Leicestershire	Surrey
Lincolnshire	Sussex
Middlesex	Warwickshire
Monmouthshire	Westmoreland
Norfolk	Wiltshire
Northamptonshire	Worcestershire
Northumberland	Yorkshire.

It appears that *Alfred the Great*, a Saxon king, was the first that divided *England* into *counties*, or *shires*.

They are subdivided into *Maritime* and *Inland*. There are 19 of the former; *seven* whereof are situate on the *German Sea*, *six* on the *Channel*, *two* at the *Severn's Mouth*, and *four* upon the *Irish Sea*, or *St. George's Channel*: Those on the *German Sea* are, *Northumberland*, *Durham*, *Yorkshire*, *Lincolnshire*, *Norfolk*, *Suffolk*, and *Essex*.

Those on the *Channel*, *Kent*, *Sussex*, *Hampshire*, *Dorsetshire*, *Devonshire*, and *Cornwall*.

Those at the *Severn's Mouth*, *Somersetshire*, and *Monmouthshire*.

Those in the *Irish Sea*, *Cheshire*, *Lancashire*, *Cumberland*, and *Westmoreland*.

The *Inland Counties* are 21 in number.

Bedford	Northampton
Berks	Nottingham
Bucks	Oxford
Cambridge	Rutland
Derby	Shropshire
Gloucester	Stafford
Hertford	Surrey
Hereford	Warwick
Huntingdon	Wiltshire
Leicester	and
Middlesex	Worcestershire.

The counties of *Chester*, *Durham*, and *Lancaster*, are called *counties palatine*, and writs issued out of the superior courts of *Westminster*, are to be specially directed.
Vide 2 Str. 1089. Andr. 191. Vide post.

The COUNTIES of ENGLAND.

The *Principality of Wales* is divided into two parts, namely, *North* and *South*.

North-Wales contains,

Anglesea
Caernarvonshire
Denbighshire
Flintshire
Merionethshire
and
Montgomeryshire.

South-Wales contains,

Brecknockshire
Cardiganhire
Carmarthenshire
Glamorganshire
Pembrokeshire
and
Radnorshire.

The writ of *latitat* runs into *Wales*. *Perry v. Jones*, *Dougl. Rep.* 212. *Lloyd v. Jones*, *Ibid*.

Cinque Ports.

These are five havens that lie in the East part of *England*, towards *France*, thus called by way of eminence, on account of their superior importance; as having been thought by our kings to merit a particular regard for their preservation, against invasions. Hence they have a particular policy, and are governed by a keeper, with the title of *lord warden of the cinque ports*; which office belongs to the *constable of Dover*: and their representatives are called, *barons of the cinque ports*. The five ports are, *Hastings*, *Romney*, *Hythe*, *Dover*, and *Sandwich*; to which *Winchelsea* and *Rye* have been since added.

To *Hastings* belong, *Seaford*, *Pevensey*, *Hedney*, *Winchelsea*, *Rye*, *Hamine*, *Wakesbourn*, *Creneth*, and *Forthcliffe*.

To *Romney* belongs, *Bromhall*, *Lyde*, *Ofwarston*, *Dangemare*, and *Romenhall*.

To *Hythe* belongs, *Westmeath*.

To *Dover* belongs, *Folkston*, *Feverham*, and *Margate*.

To *Sandwich* belongs, *Fordiwic*, *Reculver*, *Serre*, and *Deal*.

The courts of the cinque ports have similar franchises in many respects with the counties palatine, and particularly an exclusive jurisdiction before the mayor and jurats of the ports, in which exclusive jurisdiction the king's ordinary writ does not run, but his prerogative writ may issue. *Cro. Jac.* 543.

The writ of *latitat* runs into the cinque ports, and is directed to the *constable of the Castle of Dover*, or to his deputy.

Process.

Of the proceeding by Bill.

THERE are two ways of bringing an action in this court in *common cases*, by one common person against another, where the defendant is not in actual custody—the one *by bill*, the other by *original writ*.

If therefore the defendant reside in *Middlesex*, or is to be met with in *that* county, and the plaintiff proceeds by *bill* in this court, the *first process* is now called, a *bill of Middlesex*, which is a *precept*, and not a *writ*; having only a *return* and *no teste*, nor is it directed to the *sheriff* himself.

Proceeding by bill.

1 Black. Rep. 506.

If he is to be found in any *other* county, the *first process* is, a *latitat*.

The *latitat* is a *testatum writ*, grounded upon the *bill of Middlesex*, supposed to be sued out *before*, and returned *non est inventus*.

The writ of *latitat* is in the nature of an *original writ*, called a *clausum fregit*, and its antiquity beyond the memory of man.

It ought to be under the *teste* of the *chief justice*, or of the *senior judge* of the court, if there be *no chief justice*, and if it issues from any other court, it is to be under the *teste* of the first in commission. *Dalt. c. 132. Finch. 436. Cro. Car. 390.*

The writ of *latitat* should be directed to the *sheriff* or *sheriffs* of the county, where the defendant is supposed to be, or, if the *sheriffs* be parties, to the *coroner* (or *coroners* of the county, *if two or more*). 1 *Black. Rep. 506*, and if the *coroners* be parties, to *elisors* named by the master.

How to be directed.

The *latitat* may be *tested before* the cause of action, and if sued out in *term time*, it is usually tested on the first day of that term; if sued in *vacation*, on the *last day* of the precedent term; if tested in *vacation*, it is merely void, 2 *Burr. 967. 954. 5 Burr. 2588.* and must be made returnable on a day *certain* in *term time*, as on *Monday* next after the morrow of *All Souls*. 4 *Sir. 399.*

The teste.

As to suing it out before Cause of Action.

Though a *latitat* may be taken out *before* the cause of action, yet the party cannot be arrested upon it, *till after*. *Hanway v. Merry*, 1 *Vent.* 28.

Lee, C. J.

That although a *latitat* may be sued *before* the cause of action accrued, yet if the cause of action for a debt, has not accrued at the time, the defendant may, previous, tender the money, and if the plaintiff reply a *latitat* issued *before* the tender made, the defendant may *rejoin*, that *there was no cause of action at the time when the latitat issued*. For the *latitat*, in this case, is to be considered as an *original writ*; when it is replied to the statute of limitations pleaded, or to avoid a tender, it is not the commencement of the suit; and the defendant ought to have the same advantage of it as the plaintiff. The replication, in this case, makes it the commencement of the suit, and therefore to be taken in the nature of an *original writ*. *Wood v. Newton*, 1 *Wils.* 141. And *Denison*, J. agreed, such rejoinder was good. In *Foster v. Bonner* it was resolved upon solemn argument (which was an action of trespass) that the rule to consider the *bill*, not the *latitat*, as the commencement of the suit, is subject to several exceptions; for instance, where the defendant has pleaded, that one of the statutes of limitations had attached *ante exhibitionem billæ*, the plaintiff may reply a *latitat* sued out of the preceding term, and the defendant may *rejoin*, that the *latitat* was not in fact sued out till the vacation after such preceding term, and after the expiration of the time limited for bringing the action. *Cowp.* 454. 2 *Burr.* 910. *Johnson v. Smith*.

Plaint in an inferior court.

The *plaint* in an inferior court, is the *original* and *commencement* of the cause, 1 *Leon.* 302. and therefore being issued *previous* to the cause of action, on a writ of error after verdict for the plaintiff, the judgment was *reversed* being substance. *Ward v. Honeywood*, *Dougl.* 6th ed. 61.

Vide 1 *W.H.*
147. S. P.

In *Foster v. Bonner*, which was an action of *trespass*, and the *latitat* issued in vacation *before any cause of action* accrued, but before the term a cause of action did accrue, the court held the *latitat* was only to be considered as process to bring the party into court, and the cause of action accruing *before the declaration filed*, it was sufficient. *Cowp.* 454. But such declaration must be

be filed the *first term*, and not the second. *Smith v. Muller*, 3 *Term Rep.* 624.

It is said, as the process is *de die in diem*, it cannot be made returnable on the day of suing it out. *Green v. Rivet*, 2 *Ld. Raym.* 772. *Tidd* 93. *Sellon* 90. But in a late case, where a bill of *Middlesex* was sued out, and made returnable same day, the court held it might, and discharged the rule to set aside the proceedings; *Ox-lade v. Davidson*, 4 *Term Rep.* 610.; it is there said, this was in every day's practice, to sue out writs and make them returnable same day—but I never knew this to be so in my experience; the case in *Ld. Raym.* was always the governing case: it does not give the defendant time to pay, as plaintiff may also *that day* file a declaration *de bene esse*, if the return is within the rule.

Where it becomes material to distinguish, the court will consider the day when the writ is taken out, as the substance and the teste, as the form. 2 *Burr.* 962. *Johnson v. Hargreaves*.

Variance between the declaration and process, *i. e.* to answer plaintiff *qui tam pro dom. rege, quam pro seipso sequitur*, and the declaration in his own name only; omitting the *qui tam* part, is fatal. *Canning v. Davis*, 4 *Burr.* 2417. and proceedings set aside. A bill of *Middlesex* was to answer to the weavers company; and the declaration in the name of the company *qui tam* for themselves, and the poor, &c. the court held it right, it not being usual to insert in the bill of *Middlesex*, *on what account or in what right the party sues*, as in the case of executors and administrators, the case of an assignee of a bail-bond, and the like, where the process is only *ad respondendum* to *A. B. Str.* 1232. *Weavers Co. v. Forest*, 3 *Wils.* 141. 2 *Black. Rep.* 722. where *Jates J.* said: Though the plaintiff may style himself executor, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt; for the demand is still the same. And if plaintiff brings the defendant into court, this reason still holds good.

The writ of *latitat* was holden to be a good commencement of the suit in a penal action. 2 *Lord Raym.* 883. 2 *Burr.* 964. 3 *Burr.* 1243. *Contra Carth.* 233. So is a writ of *capias ad respond.* 2 *Black. Rep.* 924.

The true time of taking out the *latitat* may be averred contrary to the nominal teste. 1 *Vent.* 362.

Process now may be sued out and made returnable same day.

Variance between the declaration and process.

Latitat considered as an original.

As to the Arrest and Service of the Bill of Middlesex.

Arrest in Surry
on a bill of Middlesex bad.

The defendant was taken at *Wimbledon* in *Surry* on a bill of *Middlesex*. Rule to shew cause, why the proceedings should not be set aside, which was obtained before the time for pleading expired. *Buller, J.* A bill of *Middlesex* cannot run all over *England*: such a practice would put an end to the writ of *latitat*; and if any notion has prevailed, that this sort of proceeding is regular, it ought to be contradicted. Rule *abs. Devenege v. Dalby, Doug. 384.*

But service of a
bill of Middlesex
in London
bad.

The defendant was served with a bill of *Middlesex*, in *London*. Rule to set aside the proceedings: It was contended that as this was only for the purpose of bringing the defendant into court, it was immaterial in *what place* it was served, and this court had in several instances refused to set aside the proceedings on *this* ground. *Buller, J.* The cases mentioned at the bar are, where a *latitat* has been served in the *wrong* county. There the writ is the same, and makes no difference whether served in the one or the other county; but there is no instance in which this court has not determined that the service of a bill of *Middlesex* is irregular, except where there has been some dispute about the limits of the city of *London*. *Borman v. Bellamy, 1 Term Rep. 187.*

If the county be
doubtful.

But if it be doubtful whether the place where defendant was served was in the county of *Middlesex*, or in *London*, the court will hold it to be good service. *Drew v. Marriott, 1 Wils. 77.*

Latitat may be
served in Middlesex.

A *latitat* may now be served in *Middlesex*; but no arrest can be made. *6 Term Rep. 74. Kelly v. Shaw.*

As to issuing the Bill of Middlesex bailable.

If the debt be 10l. or upwards, and the defendant is to be arrested, first procure a warrant to prosecute on a 2s. 6d. stamp, an affidavit stamp 2s., and bill of *Middlesex* 3s. 6d. stamp. These are to be had at the law stationers; the precept is printed.

25 Geo. 3.
c. 80. s. 16.

The warrant is filled up thus :

In the court of king's bench.

Middlesex, (to wit.) Andrew Deering is retained to prosecute by John Doe as his attorney against Richard Roe.

Memorandum
of warrant,

N^o on } A. Deering, plaintiff's attorney.
the file. }

(If by an agent to the attorney immediately retained, add)
by G. G. H. his agent.

Entered or filed of record this day of
in the 36th year of king Geo. the 3d.

[Officer's name.]

The latter words are wrote by the officer who files the
warrant.

Then fill up the bill of *Middlesex* thus :

Bailable Process.

Middlesex,
to wit. }

The sheriff is commanded to take
Richard Fenn, and John Doe, if
they may be found in his bailiwick, and safely keep
them, so that he may have their bodies before the lord
the king at *Westminster*, on *Wednesday* next after 15
days of *Easter*, to answer *John Brown* in a plea of
trespass, and also to a bill of the said *John Brown*, to
be exhibited against the said *Richard Fenn*, for 100l.
upon promises, according to the custom of the court of
the said lord the king, before the king himself; and
that he have then there this precept.

Bill of Middle-
sex bailable.

Ac-etiam.

By Bill.

J. K. Attorney.

Mansfield and Way.

Oath for 56l. per affidavit filed.

2d March 1796.

Indorse the attorney's name and place of abode on the
back, with the sum sworn to, and the day it is sued out.
Loft. 58. Burr. 20. as to indorsing the attorney's name.

Make a *præcipe* for the office thus :

Middlesex, (ff.) Bill for John Brown, against Richard Fenn, cate for 100l. upon promises, returnable on Wednesday next after 15 days of Easter.

Præcipe.

Oath for 50l. per affidavit filed.

J. K. attorney.

2d March 1796.

N. B. Take the bill of *Middlesex*, affidavit, and
præcipe, with the warrant to prosecute, to the bill of
Middlesex office, No. 6, *Clifford's Inn*, pay for the oath

1s.

1s. signing the precept 6d. in term time, and 10d. in vacation; then get a warrant thereon at the sheriff's office, for which pay 4d.

Several defendants for *separate* causes of action, cannot be joined either in the *same writ*, or in the *same affidavit*. *Holland v. Johnson*. This only extends to *bailable writs*. 6 Term Rep. 697. In a *joint action*, no more than *four defendants* can be put in one writ. Therefore, if there be five or more, there must be *two writs*.

Only the defendant or defendants in one action can be included in a bailable writ, *scilicet* if the writ be not bailable.

There were *four separate affidavits* against *four several defendants*, for *separate* offences against the lottery act. The *original writ* included *all the defendants*, though the *ac-etiam* part was *several* against each; and a *separate alias capias* was *sued out* against each. Rule to set aside proceedings on the ground, that one part of the process must pursue another, that an *alias capias* cannot be *sued out* against *each* of several persons, who are *all joined* in one *original writ*, and that the original was also bad, for including *four defendants*, against each of whom there were *several affidavits*. The court was of opinion that the *alias's* were *issued rightly*, (on the certificate of the master,) and discharged the rule; but in the next term, *Buller, J.* said, that the master had misled the court, that the plaintiff might join *four defendants*, for *separate causes of action*, in one affidavit and one writ, and aver the subsequent proceedings. In *Gilby v. Lockyer*, T. 19 Geo. 3^a. All the judges agreed, that they never knew of its being the practice in their courts, that more than *one defendant* should be inserted in the *same affidavit*: and that the court had again consulted all the judges on this occasion, who were of opinion, that a plaintiff could not *join distinct defendants*, for *distinct demands*, either in the *same writ*, or in the *same affidavit*; and that the case of *Gilby v. Lockyer* ought to regulate the practice in future. *Holland v. Johnson*, 4 Term Rep. 697.

^a Dougl. 217. oct. edit.

Not bailable four defendants.

Writ against four, and four affidavits,

But *four defendants* may be put in *one writ*, although they be *distinct causes of action*, not bailable. *Yardley v. Burgefs*, T. 32 Geo. 3. cited in 4 Term Rep. 697.

Where a writ was *sued out* against the defendant and three others, founded on *four several affidavits*, Lord Kenyon discharged defendant out of custody. *Stephens qui tam v. Butcher*.

The

The rule why *several* defendants for *separate* causes of action cannot be joined in the same writ, or in the same affidavit, is founded on the *old practice* by original, which only included *one* defendant; and if *that writ* only issued against *one* defendant, the *latitat*, in which the plaintiff was permitted to add the *ac-etiam* to save expence, ought to be confined to one. 4 Term Rep. in (n) 697.

Rule why several defendants for separate causes cannot be joined.

If the defendant cannot be taken on the bill of *Middlesex*, make out an *alias*, and if not taken, issue a *pluries*, and so proceed on with *pluries pluries*, until he be taken, if he lives in that county. But put a date on the *præcipes*, when the *first writ* issued.

Alias.

Middlesex, } The sheriff is commanded, as before he was commanded, to take Richard Fenn and John Doe (as in the other)^a.

Alias.

Middlesex, } The sheriff is commanded, as oftentimes he has been commanded, to take (as in the other).

Pluries.

These writs are signed at the same office: make a *precipe* as before, adding the word *alias* or *pluries* bill: pay signing 2d.

In case the action should be in debt on bond, trover, *detinue*, covenant, assault, &c. then add one of the following *ac-etiams*:

If in debt, &c.

And there is one distinction made in the filling up a bill of *Middlesex* and the writ of *latitat* when bailable, which is this: In the bill of *Middlesex*, the *ac-etiam* is, and also to a bill to be exhibited against the defendant according to the custom of the court of our lord the king before the king himself. In the *latitat* you say, according to the custom of our court before us.

Distinction as to bailable process, and other process.

To answer John Brown, in a plea of trespass, and also to a bill of the said John Brown, to be exhibited against the said Richard Fenn, for 100l. debt, according, &c.

Ac-etiam in debt on bond.

In a plea of trespass, and also to a bill of the said John Brown, to be exhibited against the said Richard Fenn, for converting and disposing of the goods and chattels of the said John Brown to the value of fifty pounds, according, &c.

In trover,

^a The *alias* should correspond with the previous process in the names of the parties, otherwise the court will set proceedings aside. So must the *pluries*.

In

Detinue.

In a plea of trespass, and also to a bill of the said *J. B.* to be exhibited against the said *R. F.* for detaining the goods and chattels of the said *John Brown*, to the value of 500*l.* according, &c.

Covenant.

In a plea of trespass, and also to a bill of the said *J. B.* to be exhibited against the said *R. F.* for breach of covenant, to the damage of the said *J. B.* of 60*l.* according, &c.

Assault.

In a plea of trespass, and also to a bill of the said *J. B.* to be exhibited against the said *R. F.* for assaulting, beating, wounding, and evilly treating the said *J. B.* to the damage of the said *J. B.* of 500*l.* according, &c.

For crim. con.

In a plea of trespass, and also to a bill of the said *J. B.* to be exhibited against the said *R. F.* for assaulting and having criminal conversation with *E.* the wife of the said *J. B.* to the said *J. B.* his damage of 1000*l.* according, &c.

At the suit of executors.

In a plea of trespass, and also to a bill of the said *J. B.* and *C. K.* as executors of the last will and testament of *W. C.* deceased, to be exhibited against the said *R. F.* for 50*l.* upon promises, according, &c.

At the suit of an administrator.

In a plea of trespass, and also to a bill of the said *J. J.* as administrator of all and singular the goods, chattels, and credits, which were of *W. C.* who died intestate, to be exhibited against the said *R. F.* for 50*l.* upon promises, according, &c.

At the suit of assignees of a bankrupt.

In a plea of trespass, and also to a bill of the said *A. C.* and *G. H.* as assignees of the estate and effects which were of *G. T.* a bankrupt according to the form of the statutes, &c. to be exhibited against the said *R. F.* for 100*l.* upon promises, according, &c.

For foreign money.

And also to a bill of the said *C.* for 400*l.* of lawful money of *Great Britain* in debt, being the value of 6000*l.* of gold and silver currency of the island of *Antigua* in the *West-Indies*, to be exhibited, according, &c.

The court refused to set aside a bill of *Middlesex*, which was to answer the plaintiff in a plea of *debt*, instead of *trespass*. *Barber v. Lloyd*, 2 Term Rep. 513.

If Defendant is in the Liberty of Westminster.

If in a liberty.

If the defendant lives in a liberty where the sheriff of *Middlesex* may not enter, make out a *non omittas* bill of *Middlesex*, whereupon the sheriff will grant his mandate

mandate to the high bailiff of *Westminster*, who makes a warrant thereon to his officer to arrest the defendant.

Middlesex,
to wit.

The sheriff is commanded that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *Richard Fenn*, and *John Doe*, if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer *John Fenn*, in a plea of trespass, and also to a bill of the said *John*, to be exhibited against the said *Richard* for 50*l.* upon promises, according to the custom of the court of our lord the king, before the king himself, and that he have then there this precept.

Non omittas bill
of *Middlesex*
bailable.

By Bill.

Oath for 25*l.* per affid. filed. Mansfield and Way.
J. K. attorney.

2d Mar. 1796.

This is taken to the bill of *Middlesex* office as before, pay signing as for the bill, make a *præcipe* as before, only add the words, "*non omittas*," bill of *Middlesex*.

If Defendant is not to be found in Middlesex.

If the defendant cannot be found in *Middlesex*, and is to be met with in *London*, or in any other city or county, then get an office copy of the affidavit at the bill of *Middlesex* office (which will save a new one being made), pay for the same 1*s.* and 2*s.* 1*d.* for the stamp, which take to Messrs. *Provost* and *Webb*, sue out a *latitat* thereon, directed to the proper sheriff, or sheriffs of the city, town, or county, where the defendant is to be arrested.

If a warrant to prosecute has been once filed, there needs no other, but add that to the *præcipe* thus, "*bill of Middlesex sued out, day of 1796.*"

Cities and Towns having a Sheriff or Sheriffs.

There are counties *corporate*, which are certain cities and towns, some with more, some with less territory annexed to them, to which out of special grace and favor, the kings of *England* have granted to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein, such are the

Cities

Cities of		Cities of	
<i>Bristol</i>	} Have two sheriffs.	<i>Canterbury</i>	} One sheriff.
<i>Coventry</i>		<i>Exeter</i>	
<i>Chester</i>		<i>Litchfield and</i>	
<i>York</i>		<i>Worcester</i>	
<i>Gloucester</i>		Towns of	} One sheriff.
<i>Lincoln</i>		<i>Kingston upon Hull</i>	
<i>London</i>		<i>Southampton</i>	
<i>Norwich and</i>		<i>Poole and</i>	
<i>Town of Nottingham</i>		<i>Newcastle upon Tyne</i>	

How to direct
the writ.

To our sheriffs of our
city of

Bristol
Coventry
Chester
York
Gloucester
Lincoln
London
Norwich

To our sheriffs of our
town and county of
Nottingham

To our sheriff of our
city of

Canterbury
Exeter
Litchfield and county
of same city^a
Worcester

To our sheriff of our
town and county of

Kingston upon Hull
Southampton
Poole
Newcastle upon Tyne

In other counties there can be no difficulty in directing the writ, as, To the sheriff of *Berkshire*, &c. unless it be a *habeas corpus* to remove a cause out of the inferior courts. For these directions, see title *Habeas Corpus*.

If the defendant lives in a county palatine, viz. *Chester*, *Lancaster*, or *Durham*; or within any of the *Cinque Ports*, viz. *Hastings*, *Romney*, *Hythe*, *Dover*, or *Sandwich*, then the *latitat* must be directed as follows:

Counties
palatine.

Chester.

To our chamberlain of our county palatine of *Chester*, or his deputy there, greeting, &c.

Lancaster.

To our chancellor of our county palatine of *Lancaster*, or his deputy there, greeting, &c.

Durham,

To the reverend father in God *by divine permission*, lord bishop of *Durham*, or to his chancellor there, greeting, &c.

^a *Litchfield* is a city and county of itself.

And

And instead of saying in the writs, "*Our county palatine,*" say, "*Your bishoprick.*"

If to the *Cinque Ports*, the direction is, "*To our Cinque Ports, constable of our castle of Dover, or to his deputy there, greeting,*" &c.

If the action be against the *present sheriffs*, the writ Sheriff. must be directed to the coroner of the city of *London*, and coroners of any other county.

If against the *late sheriff*, then the writ may be Late sheriff. directed to the *present sheriff* to take the late sheriff.

If a tender is made *before the latitat taken out in fact*; Tender made before writ sued, the retrospective *teste* of the writ cannot deprive the defendant of the benefit of the tender. *Watts v. Baker, Cro. Car. 264.* and the jury may find the day of taking it out. *Walburgh v. Saltonstall, Sir T. Jones 149. 1 Vent. 362.* For the course of the court is, to *teste* latitats taken out in the vacation, as of the term preceding, and the course of the court is the law of a court. *Pemberton, C. J.*

Qu. If tender made and writ sued out on *same day*, whether it shall go to a jury as to the *time of tender*, and writ sued out? I take the law to be, that the tender would be bad, though it is a hard case.

George the third by the grace of God of Great Britian, France, and Ireland, king, defender of the faith, &c.^a To the sheriffs of *London*, greeting: Whereas we lately commanded our sheriff of *Middlesex* that he should take *John Denn* and *Richard Roe*, if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster* at a certain day now past, to answer *Thomas Post*, in a plea of trespass^b; and also to a bill of the said *Thomas*, to be exhibited against the said *John*, for 100*l.* upon promises, according to the custom of our court before us, and our said sheriff of *Middlesex*, at that day returned to us, that the said *John* and *Richard* were not found in his bailiwick; whereupon on behalf of the aforesaid *Thomas*, it is sufficiently testified in our court before us, that the said *John* and *Richard* do lurk and secrete themselves in your county: therefore we com-

Aailable *latitat* to *London*, with *ac-etiam* in case,

One defendant unless the action be a joint one, then not more than four.

^a If a bill of *Middlesex, &c.* has been already sued out, the memorandum or warrant will not be again necessary, but add to the *præcipe*, that a bill of *Middlesex* was issued the day of 1796, which will be a warrant for the officers not demanding it.

^b *N. B.* The *ac-etiam* already done for the bill of *Middlesex*, will suit this writ in substance,

mand

mand you, that you take them, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer the said Thomas of the plea and bill aforesaid; and have you then there this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 12th day of *February*, in the 36th year of our reign, *Mansfield* and *Way*.

Indorse on the back of the writ the attorney's name and abode, the sum sworn to, and the day of the month.

Præcipe.

London lat. for *Thomas Post* against *John Denn* tr. ca. for 80l. upon promises, returnable on *Wednesday* next after 15 days of *Easter*.

2d Mar. 1796.

J. F. attorney.

Oath for 50l. per affidavit filed.

Take affidavit, writ, *præcipe*, and warrant to prosecute, to Messrs. *Provost* and *Webb*, King's Bench office in the King's Bench Walks, who sign the same, pay 2s. 6d. then to the seal office, No. 3, Inner Temple Lane, pay 7d. when it is signed and sealed, if defendant is to be arrested in *London*, take it to No. 10, Grocers Alley, get a warrant thereon, pay 4d. if in *Surrey*, *Essex*, or *Kent*, pay 6d. any other county 2s. 6d.

N. B. Messrs. *Provost* and *Webb* sell these writs already printed, or they may be had at the stationers, and the warrant to prosecute as before; they are printed in the plural number, and it has been customary to add, if only one defendant, his name, with that of *Richard Roe*.

The writ of *latitat* may be sued out and made returnable the same day. 4 Term Rep. 610. *Oxlad v. Davidson*.

Ordered, that no printed blanks or other writs be sealed before the same are regularly made out and filled up. R. H. T. 21 Geo. 2. 1747.

Ordered, that the seal office be open in the forenoon from eleven to one, instead of from ten to twelve. M. T. 34 Geo. 3.

If the defendant be not arrested before the return, or on the return day, then issue an *alias*, which is called an *alias capias* (the *testatum* part being left out), and is signed and sealed as before; pay signing 2d. seal 7d.

George, &c. to the sheriffs of *London*, greeting: We command you, as before we have commanded you, that you take *John Denn*, and *Richard Roe*, if they may be

No printed blanks to be sealed.

Office hours.

Alias.

Alias capias.

be found in your bailiwick, and safely keep them, so that you may have their bodies before us at *Westminster* on *Wednesday* next after three weeks from the day of *Easter*, to answer to *Thomas Post* in a plea of trespass; and also to a bill of the said *Thomas* against the said *John* for 10cl. upon promises, according to the custom of our court, before us to be exhibited; and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 13th day of *April*, in the 36th year of our reign.

Mansfield and Way.

Indorse the attorney's name and sum sworn to. Make a *præcipe* as before, only say, "*alias capias*," instead of "*latitat*," and put the day the first writ issued at the foot.

In all continued writs, the *alias* must be tested the day the former was returnable; *Touchin's case*, 1 *Salk.* 669.; the *pluries* the return-day of the *alias*.

Alias when to be tested.

If the defendant is not to be met with before or on the return-day, sue out a *pluries capias*, which is like the *alias*, only instead of the words, "*as before we have commanded you*," add, "*as we have oftentimes commanded you*." Put the date of the first writ issued, in the *præcipe*.

Pluries.

If a term be omitted between the *teste* and *return* of mesne process, the cause is out of court. Therefore process ought to be continued from term to term; but upon writs of execution it is otherwise, as the cause is come to its end. 1 *Ld. Raym.* 775. 2 *Roll. Rep.* 442. 3 *Wils.* 341.

If term be omitted between the teste and return.

To answer to *John Denn*, who sues as well for our sovereign lord the king, as for himself in this behalf in a plea of debt. A plaintiff, *qui tam*, executor, administrator, &c. need not name himself so in the process (unless bail). *Str.* 1202.

If on a *qui tam* action.

To answer to *John Denn*, who sues as well for himself, as for the poor of the parish of A. in the county of B. in a plea of debt.

If the forfeiture be to the poor as well as the parish.

Upon general process, where the party is served with it, the plaintiff may declare *qui tam*, or as executor, &c. 2 *Str.* 1232. *Weavers' Comp. v. Forrest*, so, as assignee on a bail-bond, and the like where the process is only to answer A. B. *Ibid.* *Vide title Declaration.*

Of Counties Palatine.

Before I proceed further, it may so happen, that the defendant is to be arrested in one of the *counties palatine*, *Ely*, or other *franchise*.

The counties
palatine.

There are *three* counties *palatine*, viz. *Lancaster*, *Chester*, and *Durham*; and *Lord Coke* says, that it is called a *county palatine*, not a *comitè* in respect of the dignity of an earl, but a *comitatu* & a *palatio regis*, because the owner thereof, be he duke, or earl, &c. hath in that county *jura regalia*, as fully as the king had in his palace; from whence all justice, honors, dignities, franchises, privileges, as from the fountain, at the first flowed. The authority of those that had county palatines was king-like, for they might pardon treasons, &c. and judicial writs, and all indictments, were made in the name of those persons. Justices of assize, of goal delivery, and of the peace, have been made and assigned by commission under the great seal of the county palatine. If an issue be joined in the K. B. or C. B. triable in the county *palatine of Lancaster*, it shall be tried there, and remanded hither. The county palatine of *Lancaster* hath been a county palatine time out of mind. *Crompt. Jurisd.* 137. The king created the county of *Lancaster* a county palatine. 50 Ed. 3. 4 *Inst.* 204.

Lancaster.

The writs out of the superior courts, are directed to the chancellor or his deputy.

Chester.

The *county palatine of Chester* is a county palatine by *prescription*, the most antient and honorable remaining at this day. Within this county palatine, and the county of the city of *Chester*, there is and antiently hath been a principal officer called the *chamberlain of Chester*, who hath, and time out of mind hath had the jurisdiction of a chancellor, and the court of exchequer at *Westminster* is, and time out of mind hath been the chancery court for the said county, whereof the *chamberlain of Chester* is judge in equity; he is also judge of matters at the common law within the said county, for this court of chancery is a mixed court.

There is also within the said county palatine, a justice for matters of the common pleas, and pleas of the crown, to be heard and determined within the said county palatine, commonly called the *chief justice of Chester*.

The

The city of *Chester* was made a county of itself by K. H. 7. by letters patent.

All writs issuing out of the superior courts at *Westminster* to the county palatine of *Chester*, are directed to the chamberlain of *Chester* or his deputy.

The county palatine of *Durham* is said to have been erected soon after the Conquest, and is parcel of the bishoprick of *Durham*, but it is a county palatine by prescription. 4 *Inst.* 216. The jurisdiction of the bishop extends to all places between *Tine* and *Tese*. In this county palatine, there is a court of chancery, which is a mixed court, both of law and equity. *Ibid.* 218.

All writs issued out of the superior courts at *Westminster* are directed to the bishop or to his chancellor.

This court differs from the others in this, that if an erroneous judgment be given in chancery or before the justices of the bishop, error shall be brought before the bishop himself, and if he give an erroneous judgment, error shall be sued returnable in B. R. *Ibid.* 218.

These palatinate courts are superior courts of record, which exercise a jurisdiction within their own precincts in as ample a manner as the courts of *Westminster*, *Crompt.* 137. that they might have justice administered to them at home. *Vent.* 155.

The writ of *latitat* runs into the several counties palatine, for the meaning of the expression, *breve domini regis non currit*, is not that the king's writs are not to be executed in such places, but that the court cannot direct them immediately to the sheriff. 2 *Str.* 1089. *Andr.* 191.

Latitat runs in these counties.

In these counties palatine, in order to hold the defendant to bail on process issuing out of the courts at *Westminster*, the debt must be sworn to amount to 20l. or upwards; 11 & 12 *W.* 3. c. 9.; the arrest is to be made by the sheriff or his bailiff, by virtue of a mandate from the officer, to whom the writ is directed.

To hold to bail, debt must be 20l.

George, &c. To our chamberlain of our county palatine of *Chester*, or to his deputy there, greeting: Whereas we lately commanded our sheriff of *Middlesex*, that he should take *Richard Fenn* and *John Doe*, if they should found be in his bailiwick, and that he should keep them safely, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer *John Denn* in a plea of trespass^a, and also to a bill of the said John to be exhibited against the said Richard

Latitat to *Chester*, bailable.

^a The accusant.

for 50l. upon promises, according to the custom of our court before us: and our said sheriff at that day returned to us, that the said *Richard* and *John* were not found in his bailiwick; whereupon on the behalf of the said *John Denn* it is sufficiently attested in our court before us, that the said *Richard* and *John Doe* lurk and secrete themselves in your county palatine; therefore we command you, that by our writ under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff, that he take the said *Richard Fenn* and *John Doe*, if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before us at *Westminster* on *Wednesday* next after 15 days of *Easter*, to answer the said *John Denn* of the plea and bill aforesaid. and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 12th day of *February*, in the 36th year of our reign.

Mansfield and Way.

Indorse the attorney's name, place of abode, and the sum sworn to, then sign and seal it as before.

Præcipe.

The *præcipe* for the office is as before, and warrant, only in the margin put "*County palatine of Chester*" "*Lat. for.*" &c.

To the county
palatine of
Durham.

George, &c. To the reverend father in God, by divine permission lord bishop of *Durham*, or to his chancellor there, greeting (to the end of the recital of the bill of *Middlesex*): Therefore we command you, that by our writ, under the seal of your bishoprick, in due manner to be made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded, that he take the said *Richard Fenn* and *John Doe*, if they may be found, &c.

To the county
palatine of
Lancaster.
Latitat runs into
Durham.

To our chanteller of our county palatine of *Lancaster*, or to his deputy there, greeting (same as *Chesler*).

It was contended by the bishop of *Durham*, that no process would run there, but from the exchequer; and his officer refused to issue a mandate on a *latitat*: On motion for an attachment, this court declared, that whatever might be the case, if it came properly before them upon a claim of *conusance*, or plea to the jurisdiction, yet they would never endure, that the officer should refuse to receive their process, and made the rule for an attachment against the officer absolute. *Cur.* The true meaning of the expression, *breve domini regis*

regis non currit, is, that the court cannot write directly to the sheriff, as they do in other cases. *Chapman v. Maddison*, Str. 1089.

A *latitat* may be served in the counties palatine, without having a mandate. 2 *Barnard*. 318. 337. 398. *And*. 199. A *latitat* may be served.

Of the Royal Franchise of Ely.

It seems in ancient statutes, *Ely* was called a county palatine, 33 *H.* 8. c. 10. 5 *El.* c. 23. but is now only a royal franchise, and situate in *Cambridgeshire*. It was granted by *H.* 1. to the bishop of *Ely* and his successors, of hearing and determining as well civil, as criminal pleas. This jurisdiction, the bishop now exercises by his justices, by prescription grounded on the said grant. 4 *Inst.* 220. Carth. 109.

If a party who is sued in the courts at *Westminster*, plead that the lands lie, or that the cause of action arose within *Ely*, it will be bad, for he should have demanded consuance, which is all the jurisdiction a franchise has, *Carth.* 109. But if an action, that in its nature is joint, rise partly within, and partly without the franchise, the franchise cannot claim consuance. 4 *Inst.* 220.

Franchise and *liberty* are used as synonymous terms, and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in some cases, may be held by prescription. To be a county palatine, is a franchise vested in a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts: and each individual member of such corporation, is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship paramount, to have waifs, &c. to have a court of one's own, or liberty of holding pleas and trying causes, &c. to have a *bailiwick* or liberty exempt from the sheriff of the county, wherein the grantee only, and his officer, are to execute all process, &c. Definition of franchise.
Finch L. 164.

The sheriff, at the request and costs of the lord of a franchise, having return of writs, shall appoint a deputy to reside in or near the same, who, on receipt of process, shall issue his warrant to the lord of the franchise, 2 *Inst.* 220.

chise, to execute the process. *Stat. 13 Geo. 3. c. 11. s. 6.*

Arrest in liberties
to be made by
the bailiff.

And in those particular liberties having return of writs (except upon a *non omittas*), the arrest should regularly be made by the *bailiff of the liberty*, by virtue of a mandate from the sheriff. But if there be a *non omittas*, the sheriff may arrest even in the liberty, without the bailiff thereof.

There are a great number of these liberties in *England*, as in the counties of *York, Sussex, Essex, Kent, Middlesex, Huntingdonshire, &c.* therefore I should advise the praeciser to issue a *non omittas* in the first instance, which will save time; particularly if he is to call on the sheriff to return his writ. *Vide my Office of Sheriff, 72. 443.*

If the sheriff enter the liberty and arrest the defendant, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action. *Gilb. C. P. 27.*

Non omittas,
what.

The *non omittas* is a writ directed to the sheriff to enter into a liberty, where he hath made his warrant to a bailiff of a liberty to execute a process, and he hath made no return to him of what he hath done. For liberties must not be privileged to hinder or delay the general execution of justice, and if they, or their ministers do neglect their duties herein, this court may intermeddle, notwithstanding their privileges, to put the process of this court in execution, that the law receive no obstruction by them.

The return of *mandavi ballivo*, which was formerly necessary, is now presumed, and dispensed with; and the *non omittas capias* may be sued out in the first instance, which will be as follows:

Non omittas
capias.

George the third, by the grace of God, &c. to the sheriff of our county of *Surrey*, greeting: We command you, that you omit not by reason of any liberty in your county, but that you enter the same, and take *Richard Fenn* and *John Doe*, if they may be found in your bailiwick, and keep them safe, so that you may have their bodies before us at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, to answer *John Denn* in a plea of trespass; and also to a bill of the said *John* to be exhibited against the said *Richard* for 40*l.* debt, according to the custom of our court before us; and

Ac-etiam.

and have you there then this writ. Witness, &c. 12th day of February, in the 36th year of our reign.

Make a *præcipe* as before, only say *Surrey non omitas capias for*, &c. pay signing 2s. 6d. seal 1s. 2d. get a warrant thereon as before.

The king's writ runneth not into the *Isle of Man*, nor into *Guernsey*, or *Jersey*, yet the king's commission extendeth thither for redress of injustice or wrong; but the commissioners must proceed according to law and justice of the isles. 4 *Inst.* 285, 286.

Guernsey, Jersey, and Isle of Man.

Of suing out Process notailable.

If the cause of action does not require bail, or you mean to serve the defendant with process only, then the *stat. 12 Geo. 1. c. 29.* enacts, "That in all cases where the cause of action shall not amount to 10l. or upwards, in any *superior court*, the defendant shall not be *arrested*, but shall be served *personally* with a copy of the *process*." And by 5 *Geo. 2. c. 27. s. 4.* "That upon every copy of such process to be served, shall be written an *English notice* to such defendant, of the intent and meaning of such service, to the effect following: A. B. *you are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench, at the return thereof, being the 13th day of April next, in order to your defence in this action.*" And for which notice no fee shall be demanded.

Common process to be served personally.

Notice.

Nor shall any attorney charge more for the making and serving a copy of such process on defendant than 5s. 5 *Geo. 2. c. 27. s. 2.* (*be the distance what it may*). And the name of the attorney who shall be immediately retained or employed, is to be indorsed on every such copy to be served, before the service; *s. 22. Vide 1 Burr. 20.*

The charge for the service and copy of writ.

In the filling up *process* notailable, three things are to be observed. 1. In the *notice*, the *very day* of the return must be *inserted* (and by original, though it happen to be on a *Sunday*). 2. The notice to appear must be directed to the defendant by the same name as the *process*, being particularly so expressed in the act of 5 *Geo. 2.* 3. That the name of the defendant must be inserted, as thus, "*Mr. A. B. you are served,*" &c. otherwise the writ may be quashed on motion. 1 *Wils.* 104. *Bohema v. James.*

Three things to be observed in filling up process.

May be served on
return-day.

The defendant must be served with a copy of the process and notice *personally*, and service at any time on the *return-day*, though the court has rose, is now held to be good service; but it must not be served by a person *who cannot read or write*. *Maud v. Barnard*, 2 Burr. 812.

Baron and feme.

If it be against *baron and feme*, service on the husband is sufficient for both; and if the husband does not appear for himself and wife, plaintiff may enter an appearance for both. But it must express in the notice, to appear *for yourself and Ann your wife*.

Against two.

If the action be joint, *viz.* against two or more persons, each must be served with a copy of the process, and each must be named in the notice, but it is not necessary to shew the original, unless demanded. 2 Str. 877. *Cas. temp. Hard.* 138.

If the debt be
above 10l.

It is said, that if the debt be above 10l. the notice to appear at the bottom of the writ is *not* necessary. *Willis v. Lewis*, T. 16 & 17 Geo. 2. But in the common pleas it was held the contrary, *Barn.* 104. *Cooke's Rep.* 100. 147.; and the determination in the C. P. seems to be *right* and agreeable to the *letter* and *spirit* of the acts of 5 Geo. 2. & 12 Geo. 1. c. 29.

Bill of Middlesex
not bailable.

Middlesex, to wit. The sheriff is commanded to take *John Brown* and *Richard Roe*, if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer *James Denn* in a plea of trespass, and that he then have there this precept.

By Bill,

Manfield and *Way*.

John Brown, You are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench at Westminster, at the return thereof, being the 13th day of April next, in order to your defence in this action.

2d Mar. 1796.

J. K. Inner Temple.

A common
latitat.

George, &c. To the sheriff of *Kent*, greeting: Whereas we lately commanded our sheriff of *Middlesex*, that he should take *John Denn* and *Richard Roe*, if they should be found in his bailiwick, and safely keep them, so that he might have their bodies before us at *Westminster*, at a certain day now past, to answer

Thomas

Thomas Post^a in a plea of trespass. And our said sheriff of *Middlesex* at that day returned to us, that the said *John* and *Richard* were not found in his bailiwick; whereupon, on the behalf of the said *Thomas*, it is sufficiently testified in our court before us, that the said *John* and *Richard* do lurk and secrete themselves in your county: Therefore we command you, that you take them, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before us at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer the said *Thomas* of the plea aforesaid: and have you then there this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 12th day of *February*, in the 36th year of our reign.

Manfield and *Way*.

Mr. John Denn, You are served with this process, to the intent that you may by your attorney appear in his majesty's court of King's Bench, at the return thereof, being the 13th day of April next, in order to your defence in this action.

This writ is signed as before, and sealed. *N. B.* A *præcipe* also must be made out for the office, thus: *Kent, Latitat for Thomas Post, against John Denn, Tr. returnable on Wednesday next after 15 days of Easter. J. K. attorney, 2d March 1796.*

The *alias* and *pluries* in names must pursue the *latitat*, *Corbett v. Bates*, 3 *Term Rep.* 660. or proceedings will be set aside.

Indorse the name and place of abode of the plaintiff's attorney, and the day of the month, on the back. Then make an exact copy, or get a printed one at the stationer's, fill it up, and serve the defendant personally with it.

Notice was to appear 14th day of *June* without saying *instant*, or expressing the year; the court held, that it must be the next 14th of *June*, and held it right. *Weavers' Comp. qui tam v. Forest*, 2 *Str.* 1233.

A copy of *mesne* process was served on defendant, which on the backside thereof was dated at a day to come (20 *May* 1745), and even after the return of it; the process itself was so likewise. Motion to set writ

The word "trespass" may be used in all actions, where only the party is to be served.

Four defendants may be put in though the actions be separate. 2 *Term Rep.* 258. *Roe v. Cock*.

Notice.

Præcipe.

Alias.

Notice on process need not express the year.

The date of a writ is no part of it, if the *teste* be right, well enough.

^a Executors, administrators, assignees, and the like, need not be described as such in the process, when a service is only required. 2 *Str.* 1232. For upon general process, plaintiff may declare in a special character, but not vice versa. *Mcgg v. Ford*, *E.* 25 *Geo.* 3.

afide. *Per Curiam*: The indorsement of the date on the back of the writ is *no part of the writ*, the *teste* being right is sufficient. Took nothing by the motion. *Coleby v. Norris*, 1 *Wils.* 91. *E. 18 Geo.* 2.

Defendant
served with
latitat in Mid-
dlesex held
good.

It does not appear more objectionable to serve a *latitat* in *Middlesex* than in any other *wrong* county; if it give *personal* notice to the party, it is sufficient, provided it be *not* a *bailable* process. Rule refused to set aside the proceedings, because a *latitat* was served in *Middlesex*. *Kelly v. Shaw*, 6 *Term Rep.* 74.

Special Bail.

Definition.

BAIL, *ballium* (from the *French* *bailler*, which comes from the *Greek* *Ballden*, and signifies to deliver into hands), is used in our common law for the freeing or setting at liberty one arrested or imprisoned upon any action, either *civil* or *criminal*, on *surety* taken for his *appearance* at a *day* and *place* certain. *Braet. b. 3. tract. 2. c. 8.*

The reason why
called bail.

The reason why it is called bail, is because by this means the party restrained, is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison; and the end of bail is, to *satisfy the condemnation and costs*, or *render the defendant to prison*.

Bail and main-
prize, the dif-
ference,

Bail and *mainprize* are often used promiscuously in our law books as signifying one and the same thing, and agree in this notion, *that they save a man from imprisonment in the common gaol*, his friends undertaking for him before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 *Haw. Pl. Cr.* c. 88. 4 *Inst.* 180. The chief difference is, that a man's *mainperners* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday*, confine him *until the next day*, and then render him. 6 *Mod.* 231. *Lord Raym.* 706. 12 *Mod.* 275.

Special bail.

Special bail are two or more persons who undertake generally, or in a *sum* certain, that if the defendant be convicted,

convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal. Generally there are but *two persons* who become bail for a defendant.

The party bailed is delivered by the law into the custody of those who are his bail, and who are to answer the party, if they do not produce the principal to do it.

Special bail are *absolute*, or *de bene esse*: they cannot be taken *absolutely*, without consent of plaintiff or his attorney. *R. M. 1654. s. 7, 8.*

Absolute or conditional.

After notice given they become absolute, if no exception *within 20 days*. *R. M. 16 Car. 2.*

How to proceed after Bail-bond given.

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, at the return of the writ, he must, to *discharge* such bond, appear thereto, namely, by putting in *special bail*, or, as it is termed, bail *above*; so called, in contradistinction to the sheriff's bail, or bail *below*; nor can he render himself in discharge of such bond without *first putting in bail above*. *5 Burr. 2683. Harrison v. Davies.*

How to proceed when bail put in to the sheriff.

This bail may be put in for the purpose of rendering the defendant (by his own desire) *previous* to the return of the writ.

May be put in to render.

It may be put in by the defendant's attorney, in consequence of his undertaking; or by the sheriff or his bail, for their own indemnity. *Vide 2 Str. 876. Berchere v. Colson.*

Sheriff, &c.

Who may not be Bail.

By rule *M. 1654*, no attorney shall be bail for a defendant in any action, *R. M. 14 Geo. 2.* nor his clerk. *Bologne v. Vaughan, Cowp. Rep. 228. Vide Dougl. Rep. 466.* But if a person, who by the rules of the court is not permitted to become bail, shall be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in. *Ibid.*

No attorney's clerk shall be bail, nor himself.

No *sheriff's officer, bailiff, or other person concerned* in the *execution of process*, shall be permitted to be bail in any action or suit depending in this court, nor persons outlawed *after judgment*. *R. M. 14 Geo. 2.* The *keeper of the Poultry Compter* was rejected. *Dougl. Rep. Hawkins v. Magnall, 466.* So *Marshalsea court officers,*

No sheriff's officer, &c. shall be bail.

officers, and a *serjeant at mace*, though he be a summoning officer to warn juries 1 *Black. Rep.* 799. Persons convicted of perjury, (and he may be asked if he has not stood in the pillory,) 4 *Term Rep.* 440. are objectionable. *Kex v. Edwards.*

When to put in, in London or Middlesex.

When to put in bail in London or Middlesex.

It is ordered, that where any defendant shall be arrested by the sheriffs of London or Middlesex, by process issuing out of this court, and shall give to such sheriff a bail-bond for his appearance on the day of the return of such process, such defendant shall have leave for *four days after that return*, to put in good bail, at the suit of the plaintiff in such process; and within that time all proceedings upon the bail-bond to the sheriff shall stay. *R. M. 8 Ann.*

If the last of the four days happen on a Sunday.

The *four days* are reckoned in this court *exclusive*; and if the *last* of the *four days* happen on a Sunday, then the defendant has all Monday to put in his bail. 2 *Str.* 782. *Stredley v. Sturt.*

How to put in Special Bail by Bill.

How to put in special bail by bill.

The defendant having been arrested and put in bail to the sheriff, the first step to be taken to get rid of the bond is, to put in *bail above*; to do which, apply for a short copy of the writ at the office where the writ was signed, or at the sheriff's office, together with the *sum sworn to*, for that will be wanted in the future stage of the business. Then get a special bail-piece at the stationer's, pay for the same 2s. 1d. insert the name of the county the same as that in which the writ issued; and the bail are to be *two housekeepers*, who can justify in double the sum sworn to, after payment of *all their debts*.

Memorandum to be delivered on putting in special bail to the judge's clerk.

The act of 25 *Geo. 3. c. 80.* enacts, That every attorney, at the time of putting in bail, shall deposit in the hands of the judge's clerk the memorandum or minute of his warrant to defend, stamped with a 2s. 6d. stamp, which the judge's clerk is to receive gratis; who is to deliver over the same to the proper officer. *Seet. 25.*

Husband and wife.

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife. 1 *Vent.* 49.—If the wife be arrested by *mesne process*, she shall be discharged on common bail, whether she be arrested singly, or jointly with her husband. *Cra. Jac.* 445. 1 *Lev.* 216. But if her coverture be doubtful, or she has

has been trusted as a *feme sole* by her own acknowledgment, she must find *special bail*: so if she have a *separate* maintenance by deed, 5 *Term Rep.* 682. for she ought to have a permanent fund, out of which she can satisfy her creditors.

A *feme covert* was discharged out of custody because she was arrested *without her husband*, though the writ was sued against *both*, and *non est inventus* returned as to the husband; *Edwards v. Rourke* and wife, 1 *Term Rep.* 486.; for a *feme covert* has no property of her own; and if it were permitted to arrest her, she might be imprisoned for life. *Per Ashhurst, J.*

In the Court of King's Bench.

Middlesex, } *J. K.* is retained to defend by *John*
to wit. } *Jones* as his attorney, at the suit of
Joseph Sparks.

The form of the memorandum or warrant to defend.

Entered or filed of record, } *J. K.* defendant's at-
this day of in the } torney; (if by an
36th year of King Geo. 3d. } agent add) by *M.* his
agent.

Bail above may be put in at a judge's chambers on a *dies non juridicus*, that day is considered as a day for such business. *Baddeley v. Adams*, 5 *Term Rep.* 170. *per Cur.*

Bail above may be put in on a *dies non*.

If time should be wanted to put in bail, a summons may be obtained for that purpose, and the judge will grant it on terms of *putting plaintiff in the same state, he would have been, had the bail been put in in time*, and half an hour's attendance is sufficient.

If time is wanted to put in bail.

Easter Term, in the 36th year of the reign of king Geo. III.

Mansfield and Way

Middlesex, } *John Jones* is delivered to
to wit. } bail on a *cepi corpus*

to

John James, of Love-lane,
London, mercer,

and

Joseph Wadden, of Fleet-
street, London, hosier.

J. K. attorney, }
sworn to }
£100. }

At the suit of
Joseph Sparks.

18 April 1796.

Special bail-
piece, 2s. stamp.

Take

Take the bail, and bail-piece, to one of the judge's chambers in *Serjeants Inn, Chancery-Lane*, and the clerk will take the recognizance as follows:

Recognizance by bill.

"You do jointly and severally undertake that, if John Jones shall be condemned in this action, at the suit of Joseph Sparks, he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal of the Marshalsea, or you will do it for him.

"Are you content?"

Pay the clerk 4s. in term-time, in vacation 5s.; as soon as you have done this, give notice in writing of the bail being put in, to the plaintiff's attorney, pursuant to the following rule:

Rule respecting notice.

Every attorney of this court, who shall put in any special bail before any justice of this court, *de bene esse*, upon a *cepi corpus*, shall give notice thereof without delay to the plaintiff or his attorney. *M. 16 Car. 2.*

Joseph Sparks, plaintiff,
and

In the King's Bench.

John Jones, defendant.

Notice of bail.

Take notice, that special bail was this day put in for the defendant in this cause, before the Honourable Mr. Justice *Grose*^a, at his chambers in *Serjeants Inn, Chancery-lane, London*; and the names are, *John James*, of *Love-lane, London*, merchant, and *Joseph Wadden*, of *Fleet-street, London*, hosier, dated the 18th day of April 1796.

Your's, &c.

J. K. Attorney for the defendant, *Inner Temple*.

To Mr. G. H. Attorney for the plaintiff.

If they are the same as are bail to the sheriff, then you add, "and they are the same, as are bail to the sheriff."

Notice, what it ought to contain.

Notice of bail on an arrest, ought to be not only by a note given of the parties names who are to be bail, but also of their addition, trade, substance, and place of abode, that so they may be more easily inquired after by the plaintiff, or his attorney. *11 Mod. 2.* Also it is necessary to intitle the cause, and name the street they live in, for the parish has been held too wide a designation. *Loft. 72. 194.* A notice given in the name of one of the plaintiffs only, where there are joint plaintiffs, bad. *Ibid. 237.*

^a The judge before whom put in.

Of excepting to the Bail.

If the plaintiff be dissatisfied with the bail above, and they be not *the same as are bail to the sheriff*, he must except against them within twenty days after notice given, otherwise such exception is void, pursuant to the following rule:

If dissatisfied with the bail.

It is ordered, that no exception to special bail put in before any justice of this court shall be made for the future after twenty days notice given of such bail being put in, according to the course of this court; and exception after that time made, shall be void and of no force.

Exception to bail to be made within twenty-days after notice of bail.

R. M. 8 Ann.

Exception must be in writing entered in the judge's book, before whom the bail was taken; and the entry in the judge's book is thus, "*I except against these bail.*" G. H. plaintiff's attorney. And the notice to the defendant's attorney will be, naming the cause, "*I have excepted against the bail put in for the defendant in this cause.*"

Exception to be in writing.

G. H. plaintiff's Attorney.

To Mr. C. D. Attorney for the defendant.

That in every action in this court, where special bail is put in, and an exception entered against the said bail, and notice of such exception is given in writing to the defendant's attorney, the defendant shall procure his said bail to justify, (if the notice be given in term time,) in four days after such notice; or shall add other bail who shall justify within the said four days; but if such exception be entered in vacation-time, and notice thereof be given in like manner, the bail put in, or other additional bail, shall justify on the first day of the subsequent term. R. E. 5 Geo. 2.

When to justify after exception.

Vacations

Of justifying Bail.

After the plaintiff's attorney has entered his exception, and given notice thereof to the defendant's attorney, the bail (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves (in case they do not mean to render the defendant), and the plaintiff may oppose them by his counsel; if it appear they are insufficient, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

Same bail.

If the *same bail* are to justify, as have been put in, and notice given thereof, *one day's notice is sufficient* for the justification, and such notice may be given on *Friday* for *Saturday*, or on *Saturday* for *Monday*; the form of such notice will be as follows:

In the King's Bench.

Joseph Sparks, plaintiff,
and

John Jones, defendant.

Notice of the
same bail justifying.

Take notice, that the bail already put in for the defendant in this cause, and of whom you have had notice, will on *Saturday* next justify themselves, in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant: dated this 20th day of *April* 1796.

Your's, &c.

J. K. Attorney for the defendant.

To Mr. G. H. Attorney for the plaintiff.

Sittings in Serjeants Inn Hall.

Ordered, That the court do sit in *Serjeants Inn Hall*, in *Chancery Lane*, every morning during term from half past eight, till ten, to take justification of bail, and hearing motions of course, and discharging of insolvent debtors; and that on *Mondays*, *Fridays*, and *Saturdays* it do adjourn from *Serjeants Inn* to *Westminster-hall*, to transact the usual business (except the above). *E. T.* 28 *Geo.* 3. 1788.

N. B. This was on account of *Warren Hastings's* trial, and the bail do attend before half past nine.

Now adjourned
to Westminster.

Ordered, That the sittings of this court in *Serjeants Inn Hall*, from and after the last day of this term be adjourned: and it is further ordered, that all the business heretofore transacted at *Serjeants Inn Hall*, be done in the court at *Westminster-hall*; where one of the judges will sit during term time, every morning at half past nine, for the purpose of taking the justification of bail, and discharging insolvent debtors, &c. and that no bail be permitted to justify after ten of the clock. *R. T.* 31 *Geo.* 3.

Warren Hastings's trial ended this term.

When bail are
out of court.

If the bail do not justify within the time limited by the rule, and no further time is given by the court, they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired, without leave of the court. *Loft.* 72. 187. *per Cur.* *M.* 25 *Geo.* 3. *T.* 24 *Geo.* 3.

This

This court (*H. 7 Geo. 3. in Smith v. Trinder*) where the bail were to justify in 4000l. suffered one bail to justify in 4000l. and two other in 2000l. each. *Sellon, 169.* Three bail justified, *Loft. 252.*

Sometimes it so happens that one of the bail cannot attend, or that there be some objection to hinder the justification; in that case, you may justify the *one*, and pray *two* days further time to *put in, and justify another* in the room of the *one* rejected. May pray a further day.

Of adding fresh Bail, and justifying.

If the bail already put in, do not mean to justify, then you may add *two more* to those already put in on the bail-piece, and give notice of justifying them on the same day; but such notice must be given *two days exclusive* of such justification; as for instance, *exception* is entered against the bail on the 19th of *April*; notice is given to *justify* the 23d, you must deliver such notice on the 21st. So that the notice is *exclusive* of *one* day, and *inclusive* the other: *Monday* for *Wednesday* is good; *Saturday* for *Monday* will not do for added bail, as *Sunday* is reckoned no day for this purpose; *Friday* for *Monday* is good. Of adding fresh bail.

In the King's Bench.

Between *Joseph Sparkes*, plaintiff,
and
John Jones, defendant.

Take notice, that *Aaron Moses*, of *Duke's-place*, *London*, merchant, and *George Duke*, of *Hatton-street* near *Holborn*, in the county of *Middlesex*, broker, will, on *Saturday* next, add themselves to the bail already put in for the defendant in this cause; and at the same time will justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant: dated the 21st day of *April* 1796. Notice of adding and justifying.

Your's, &c.

J. K. Attorney for defendant.

To *Mr. G. H.* Attorney for plaintiff.

These may be added the same morning you justify in court; pay 2s. each name, *but mind and have the bail-piece in court to give the master*; therefore on the *preceding evening* get it of the *judge's clerk*, or he will attend with and deliver it to the master; pay him 2s. 6d. May be added in the treasury chamber.

You may put in bail, and justify at the same time by giving notice for that purpose, *two days exclusive* of the day; which is done as follows: fill up a bail-piece, May put in and justify bail on the same day.

M

take

SPECIAL BAIL.

take it to the judge's clerk, who will take the recognizance; pay 4s. and 2s. 6d. for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to council to move.

If you add only *one* person to the bail already put in, and he with one of the other justifies, then your notice will be as follows:

Joseph Sparkes, plaintiff.
and

In the King's Bench.

John Jones, defendant.

Notice to add
one, and justify.

Take notice that *E. F.* of, &c. will on *Saturday* next, add himself to the bail already put in for the defendant in this cause, and that he, together with *John James*, one of the bail already put in for the said defendant, and of whom you have had notice, will at the same time justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant: dated this 21st day of *April* 1796.

Your's, &c.

J. K. Attorney for defendant.

To Mr. G. H. Attorney for plaintiff.

How to justify in Court.

How to justify
in court.

In the evening *bespeak* bail-piece at the judge's chambers, and the clerk will deliver it to the master in court; pay 2s. 6d. get an affidavit of the service of such notice sworn, and *on the back indorse the names of the plaintiff and defendant*, with the counsel's name, "*to move to justify the within bail*," give it to counsel with 10s. 6d. and he will move it; take your bail in court to the master; the officer swears them, and the master asks if they are worth *double the sum sworn to, after payment of all their debts*, for which pay the officer 9s.; in the evening go to the clerk of the rules, and he will *draw up the rule* for the allowance of the bail; pay 4s. serve copy on plaintiff's attorney afterwards; get the bail-piece of the *master's clerk*, and file it with Messrs. *Provost and Webb*.

a N. on R.
8 W. 3. (c).

Rule for allowance of the bail must be drawn up, or an attachment may be had against the sheriff.

Bail was put in and justified, but the *rule* for the allowance of it was not served, bail was opposed, and an attachment against the sheriff was obtained for not bringing in the body. Motion to set it aside. *Lord Kenyon*. Bail is not regularly put in till the allowance of it be served, and it is of importance that *all* the steps prescribed by the practice of the court should be followed:

If

If we were to suffer this exception to prevail, it would enable the defendant's attorney to put into his pocket, those duties which belong to the revenue. *The King v. Sheriff of Middlesex*, 4 Term Rep. 493. Rule discharged.

next after in the 36th year of king
Geo. 3d.

Sparkes } Upon reading the affidavit of *A. B.* it is or-
v. } dered, that the bail put in for the defendant
Jones. } in this cause, who have this day justified
themselves in court, be allowed, and the bail-piece
filed on the motion of Mr. Marriott. By the Court.

Rule for the al-
lowance of bail.

N. B. The bail-piece is given to the master at the time of the justification in court, who takes it to his office, the defendant's attorney should get same from the master's clerk, and file it with Messrs. *Provost and Webb* within 20 days; but if the defendant is in custody at the time of the justification, they will not sign the *superfedeas*, for his discharge, until it be filed with them, in that case file it forthwith.

In the King's Bench.

Between Joseph Sparkes, plaintiff,
and
John Jones, defendant.

J. C. clerk to E. H. of, &c. attorney for the defendant in this cause, maketh oath and faith, That he did on the 14th day of November instant, personally serve J. K. the plaintiff's attorney, with a true copy of the notice hereunto annexed.

Affidavit of ser-
vice of notice
of justification.

If you serve the servant of plaintiff's attorney or clerk, say, "Served Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said J. K. at his house in Serjeant's Inn, Fleet-street."

In order to save this trouble and expence, where the attorney certifies the bail are good to plaintiff's attorney, and he can rely on his word, this mode of justification is dispensed with; and the bail are taken to a judge's chambers to justify by consent; pay 2s. The court have held the fee of 10s. 6d. improper to be received for the consent.

Plaintiff's at-
torney may con-
sent.

Bail put in by one attorney for the defendant, and notice of justification given by a new attorney, not allowed by the court; the bail shall not be permitted to justify; and the master certified, that by the established practice,

Bail put in by
one attorney,
and notice to
justify by ano-
ther, not good,
without leave of
court.

practice, a party cannot change his attorney without leave of the court, or a judge's order. *Dougl. Rep.* 217. *Macpherson v. Robinson.* 2 *Black. Rep.* 1323. *Kaye v. De Mattos.* S. P.

If one be excepted to, and another added.

If one person be *excepted to* as bail, and another added, the name of the *former* may, with leave of the court, be struck out of the bail-piece at any time before *scire facias*. *Sayer's Rep.* 58. And proceedings as to him may be staid after *scire facias* brought, *ibid.* 309. till then he is not exonerated, 1 *Blackf. Rep.* 462.

Exoneretur nunc pro tunc.

One of the bail had not justified, and a motion was made to stay proceedings against him, which was granted; but his name *still remained on the bail-piece*, after two *sci. fa.*'s and *nihil*s returned, an *exoneretur* was ordered to be entered *nunc pro tunc*. *Humphry v. Leitz,* 4 *Burr.* 2107.

Must apply in proper time.

Mr. J. Yates said, where a bail had not justified, he must apply in *proper time*, to have his name struck out of the bail-piece; and in *Wilkinson v. Lomax* it was said, it was time enough for him to apply when he first finds himself attacked. *Ibid.*

In *Jones v. Tubb* the court said, as he was excepted to and refused to justify, he might reasonably think he was no longer bail, therefore application *after an insolvency* of one of the bail, was held time enough. 1 *Wils.* 337.

Landed property in Jamaica does not qualify to justify.

Mr. John Calendar, a merchant, came to justify as bail, the sum he was required to justify in was 9000*l.* and he regularly justified in that sum *inclusive* of his landed property in *Jamaica*. He was objected to the including his landed property in *Jamaica*. The court thought the objection a good one; because his landed property in *Jamaica* is not liable to the process of this court. *Boddy v. Leyland,* 4 *Burr.* 2526. *contra* 1 *Black. Rep.* 444.

Of opposing the Bail.

Opposing bail, on what grounds they will be rejected, or not. R.M. 14 Geo. 2. Cowp. 828. Dougl. 450. 466. Black. 799. 4 Term Rep. 440. 4 Burr. 9516.

Generally, bail are opposed on *several* grounds, as that one of them is an attorney, an attorney's clerk, sheriff's officer, keeper of a prison, marshal's court officer, serjeant at mace, summoning officer to warn juries, an outlawed person, or one convicted of perjury; foreigner, if he has no property in *England*; or that there is some mistake in the notice to justify; namely, that it should have been given *two days* previous,

vious, instead of one; that the bail have assumed *names* that are either *feigned* or *belong to other persons*:—for the punishment of such bail. *Vide* 21 *Jac.* 1. c. 26. s. 2. 4 & 5 *W. & M.* c. 4. s. 4. 1 *Str.* 384. But the court will not vacate the proceedings against the party personated, until the offender be convicted; 1 *Vent.* 301. nor can a conviction take place, until the bail-piece be filed, 2 *Sid.* 90. that they are not *house-keepers*: if they be, the rent paid is immaterial, though under 10l. *Loft.* 148.; nor is it necessary they should have been assessed to the poor's rate, *ibid.* 328. Not being worth double the sum sworn to, after payment of all their debts. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been twice *bankrupts*, and not paid 15s. in the pound, *Mountain v. Wilkins*, *M.* 24 *Geo.* 3. Lastly, after the expiration of the rule to bring in the body. *Loft.* 438. *Highway v. Tyers.* *M.* 20 *Geo.* 3.; but they may render in discharge of themselves, on the day the rule expires.

Of putting in Bail in the Country, and transmitting it.

By 4 & 5 *W. & M.* c. 4. The chief justice, &c. of the different courts, and chief baron, may, by one or more commission, empower persons, other than common attornies and solicitors, as they shall think fit, in all and every the usual shires and counties, to take and receive recognizance of bail, as persons shall be willing or desirous to acknowledge in any action depending in the said courts, in such manner and form, and by such recognizance or bail-piece, as the justices and barons have used to take the same; which shall be transmitted to the court where such action shall be depending, who upon affidavit made of the due taking thereof, by some credible person at the taking thereof, such justice or baron shall receive the same; and to take but 2s. for such recognizance.

The chief justice, &c. may empower persons to take bail.

Seft. 2. Power is given to the justices and barons to make rules for justifying such bail by affidavit, *duly taken before the said commissioners*, who are empowered to take same, and also to examine the sureties on oath, touching the value of their respective estates. The third clause empowers justices of assize in their circuit to take such bail; the fourth and last section, makes it felony, for one to bail in another's name.

And may make rules for justifying by affidavit.

This statute was to prevent the inconveniency that was at common law, for before that time, bail was taken *de bene esse* before the judge, and if not excepted to in twenty days, then such bail stood.

Bail-piece, when to be transmitted.

By rule 8 *W. 3.* It is ordered, that all bails taken by any commissioner *within forty miles distant from London and Westminster*, shall be transmitted to the chief justice, or one of the justices, *within eight days* after the caption; *above* the distance of forty miles *within fifteen days* after caption, unless all of them be in their circuits, and then as soon as any one of them shall be returned to chambers.

Book to be kept.

That the commissioner is to keep a book for entering the names of such bail taken, and the plaintiffs, as in the bail-piece, with the name of the defendant's attorney, and the time of taking.

Plaintiff to except within 20 days.

That the plaintiff's attorney may apply to the commissioners book for the names, and if insufficient, may except against them *within twenty days after transmitted*, and notice to plaintiff's attorney of the caption: and in that case, defendant must either put in *better bail*, or the cognizors of such bails must justify themselves in court, either by affidavit taken *before such commissioner* that took the bail, or by oath made in court, or before one of the judges of the said court.

Affidavit of caption.

The affidavit of the caption shall be made before one of the judges, or some person who shall have power to take affidavits in causes depending in this court.

Affidavit to be, that they are housekeepers, respectively worth so much (mentioning the sum they are bail for) after all their debts are paid, or exclusive of all debts or demands due from them to any person or persons whatsoever. N. on said rule.

Six days to put in bail in the country.

In case of arrest of any defendant in any county of this kingdom (except *London or Middlesex*), by process issuing out of this court, such defendant shall have leave for *six days* to put in good bail, *after the return* of such process, without any prosecution whatsoever to be made in the mean time on the bail-bond to the sheriff. *R. M. 8 Ann.*

Notwithstanding the rule 8 *W. 3.* I conceive the bail-piece must *actually be filed with one of the judges, on the 6th day after the return of the writ*, or the bond may be assigned, pursuant to the stat. 4 & 5 *Ann. c. 19.* and notice given, if the proceedings be by bill, but if the bail be taken before the *return of the writ*, and in vacation

vacation time, then the days of transmissiion may be attended to. Notice should be given. If the bail be acknowledged before a judge of assize, no affidavit is necessary upon the transmissiion, the clerk keeps the bail-piece, and enters same in the judge's book on his return to town.—Notice must be given.

How to put in Bail before a Commissioner.

Fill up the bail-piece on a 2s. stamp, parchment as in p. 157; take it with the bail to a commissioner of the court, who will take the recognizance, for which you pay 2s. only; and it is usual to have an affidavit engrossed on treble 6d. paper of the due taking the bail before such commissioner, to which is annexed the bail-piece, and sworn before a commissioner for taking affidavits, but not the person authorized to take such bail.

How to put in the bail.

In the King's Bench.

Peter Rix, plaintiff,
and

John Doe, defendant.

Thomas Jones, of Newport, in the county of Bucks, gentleman, maketh oath and saith, That the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by John Brown of Newport aforesaid, grocer, and James Rogers of the same place, farmer, before E. F. Esquire, the commissioner, who took the same in this deponent's presence the day of last past,

Affidavit of due taking bail in the country to be sworn before a commissioner, not the person authorized to take the bail. 2s. stamp.

Sworn, &c.

T. J.

Also it is usual for the attorney in the country to send to his agent at the same time, an affidavit of justification.

Peter Rix, plaintiff,
and

In the King's Bench.

John Doe, defendant.

John Brown of Newport in the county of Bucks, grocer, and James Rogers of the same place, farmer, bail for the defendant in this cause, severally make oath and say; and first, this deponent John Brown, for himself saith, That he is a housekeeper in Newport aforesaid, and that he this deponent is worth 200l. over and above what will pay all his debts: And this deponent James Rogers for himself saith, That he is a housekeeper in Newport aforesaid, and is worth 200l. over and above what will pay all his debts.

Affidavit of justification, 2s. stamp. N. B. May be sworn before the commissioner appointed to take bail, but not before the commissioner before whom the affidavit of the due taking the bail was sworn.

On receipt of which, the agent files the bail-piece, with the warrant or memorandum to defend, as before mentioned

mentioned in stat. 25 Geo. 3: c. 80. and the affidavit of the due taking thereof, with one of the judges of the court, for which he pays 5s. in term, and 1s. more in vacation, and gives notice to plaintiff's agent, and at the same time, he usually sends a copy of the affidavit of justification.

In the King's Bench.

Peter Rix, plaintiff,
and

John Doe, defendant.

Notice of such
bail and affidavit
being filed with
the judge.

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the right honourable *Lloyd lord Kenyon*^a, at his chambers in *Serjeant's Inn, Chancery-lane, London*.
Dated the day of 1796.

Your's, &c.

T. S. agent for defendant.

To Mr. *R. C.* agent for the plaintiff.

N. B. Some practisers add the names to the notice of the bail, it may be done either way.

Of Exception and Justification.

Exception, and
notice of justifi-
cation.

The plaintiff's attorney may except against them the same as in *London and Middlesex*, within twenty days, and notice must be given of justification as before, only add the words, "*by affidavit*." Affidavit is to be made of the service of notice, and counsel to move; take affidavit and bail-piece into court if not filed; if it is, bespeak it of the judge's clerk, pay 2s. 6d.; then give a brief to counsel *to move to justify*, and the clerk of the papers reads it, for which you pay 9s. to the officers of the court, rule for allowance of the bail 4s.

Within what
time bail-piece
to be filed.

In town as well as country causes, *when the bail is completed*, the bail-piece must be filed *within twenty days after*, by the attorney who puts it in, under the penalty of 40s. *Trin. 13 Car. 2.* If the bail is justified in court, apply to the master's clerk for the bail-piece; if justified at chambers, get it at the judge's chambers, pay the clerk 1s. and file it with Messrs. *Provost and Webb*.

What is a Waiver of Justification.

In case the declaration be delivered *before the bail have justified*, and not indorsed thereon, that the same is delivered *de bene esse*, or *conditionally*; (or if the same

^a The judge with whom the bail-piece is filed,

be filed in the office, and the notice does not state that the same was filed *de bene esse*, or conditionally;) or if plaintiff demands a plea, these will be a waiver of the justification of the bail. *N. on R. M. 10 Geo. 2. Reg. 2. (b). R. M. 8 Ann.* So if he declare in chief before bail put in, it is a waiver of the bail.

Taking an assignment of the bail-bond, is not a waiver of the exception. *Salk. 97.*

If the same Bail to the Sheriff become Bail above.

If the same persons who are bail to the sheriff, become bail above, and the plaintiff conceiving them to be insufficient, is desirous of a justification, he must enter his exception, and give notice as before directed, that the defendant may justify if he thinks fit, and serve the sheriff with a rule to return the writ (if this be not done previous, and which always may be done on the return day of the writ). If it be already done, and the sheriff has returned *cepi corpus*, then he may serve the sheriff with a rule to bring in the body: But if the defendant neglect to justify his bail, on the day the rule expires, (or render,) the plaintiff may the next day, move for an attachment against the sheriff for his contempt, in not obeying the last rule. And so it will be if he does not obey the first rule. *Vide title Proceeding against the Sheriff* in this case.

Rule to bring in the body expired the 21st November 1785. No bail put in till Saturday the 19th. Notice of such bail, and to justify, was given for the 21st, being Monday. Defendant on the Monday came with his bail, and the notice being deficient (Sunday being held as no day), defendant prayed time for two days, which was granted; fresh notice was given for the Wednesday. Bail came to justify, and was opposed by Mr. Baldwin, who alledged that the rule to bring in the body expired on the Monday preceding, and that the two days granted by the rule was a surprise on the court. Mr. J. Buller; The first notice was short, and the rule to bring in the body expiring on the Monday, the court ought not to have granted the rule, for Sunday is no day. But if it had been for bail already put in, notice on Saturday to justify Monday would have been good. Therefore court refused to let the bail justify. *Overton's bail. Mich. T. 26 Geo. 3.*

How to proceed if the bail to the sheriff become bail above, to compel them to justify.

Bail justifying after rule to bring in the body too late.

Of

Of Filing the Bail-piece.

Bail taken before or on continuance-day to be filed of the preceding term.

Every bail taken before or upon the *continuance-day*, is a bail, and to be filed of the *preceding term*; and every bail taken *after* the *continuance-day*, is a bail, and to be filed of the *subsequent-term*, and not otherwise; but where new bail are added to the other bail taken on or before the *continuance-day*, in such case new bail shall be taken and filed as of *that term* in which the bail was *first* put in. *N. on R. E. 5 Geo. 2. 1 Salk. 100.*

If no exception to bail, how to proceed.

If no exception to bail is made within proper time, the defendant may make affidavit of the service of notice, *that such bail put in, upon the back of the bail-piece* (for which oath no fee is to be taken), and file the same with the master. *R. M. 16 Car. 2.*

Justification in vacation, if defendant a prisoner.

It is said by a *learned author*, that where a defendant is in custody of the *sheriff* or *marshal* in a long vacation, such bail *must justify* themselves in *open court*, before the defendant is entitled to his discharge, so that if the plaintiff will not consent to a justification at chambers, the defendant must lie in prison till the next term. The practice is not so in this court, for he *may justify* for this purpose, *on the usual notice*, before a judge at his chambers, and the plaintiff may oppose the bail. A great benefit to prisoners.

As to the Bail of an Alien.

The bail of an alien may be discharged having been sent out of the kingdom, and having left no effects to answer.

The bail in these actions obtained rules why an *exoneretur* should not be entered on the several bail-pieces, the defendant having been sent out of the kingdom under the alien bill, 33 Geo. 3. c. 4. the ground of which was, that no blame was imputable to them to render the principal; it does not appear in what stage the causes were. *Lord Kenyon*, The bail only engaged for the principal in the then situation of the parties; but it is now become impossible for them to render the principal, and this impossibility does not arise from any act which they could control, but from an operation of an act of parliament. These bail therefore, to whom no fault or neglect whatever is imputable, ought not to suffer in consequence of an act which was passed for the benefit of the public. *Ashhurst, J.* The plaintiffs have no reason to complain of our granting these applications,

plications, for even if they had severally proceeded to judgment, and charged the defendant in execution, he might equally been sent out of the kingdom. Court were about to make the rule absolute; but *Bower* suggested, that they should require affidavit from the bail, that they had no effects in their hands belonging to defendant, out of which they could repay themselves in the event of the several plaintiffs recovering, and that they were not indemnified. *R. Abs. on condition only*, that the bail produced such affidavits. *Merrick v. Vaucher, Hampe v. Same, Lazard v. Same, 6 Term Rep. 50.*

This was a similar application, the plaintiff produced an affidavit that defendant had deposited a draft for 1000l., the amount of plaintiff's demand, on *Drummond and Co.* the bankers, with his attorney, who had indemnified the bail, the court said that the disclosure made, evinced the propriety of the distinction laid down in the former determination, and discharged the rule. *Goles v. De Hayne, 6 Term Rep. 52.*

But if the alies has left property, the bail must pay.

On the trial a verdict was obtained for 1000l. Motion to exonerate the bail on payment of the 1000l. deposited, on affidavit they had no other effects in their hands out of which they could pay costs; *on shewing cause*, it was insisted that as the bail had chosen to defend the action with a view of taking the chance of a verdict in their favor, they ought to pay costs; of this opinion was the court, and discharged the rule. *6 Term Rep. 246. S. C.*

If they try the cause,

As to *exonerating bail*, and *rendering*, *Vide title Proceedings against Bail.*

Bail-Bond.

Of the Proceedings on the Bail-Bond.

THE taking an assignment of the bail-bond is a voluntary act of the plaintiff, therefore he should be well convinced of the *responsibility* of the bail, for by making his election to take the bond, he thereby discharges the sheriff, and cannot afterwards resort to him either to *return the writ*, or *bring in the body*. *Vide 1 Wils. 223. Salk. 99. Ld Ray. 722.*

If bail above be not duly put in, or when excepted to, they do not justify *in due time*, the bond is forfeited; and

and the plaintiff may either take an assignment of it, or proceed against the sheriff for not bringing in the body, at his election.

If he rules the sheriff to bring in the body, he cannot proceed to assign the bond, because he has made his election to proceed against the sheriff; but contrary, if he only rules to return the writ.

London or
Middlesex.

In *London* or *Middlesex* no bail-bond can be put in suit, until *four days after the return of the writ*. *R. M. 8 Ann.*

Country.

If the arrest be in any other *county* or *city*, then not till *six days after the return of the writ*. *Ibid.*

The days reckoned,

A *latitat* was returnable on *Wednesday*, and, on debate, held that the bond could not be assigned until after *Monday*; for the *four days* are to be one *inclusive* and the other *exclusive*; and where the *fourth day* is *Sunday*, the party has all the *next day* to put in bail. *2 Str. 914. Ibid. 782. Bullock v. Lincoln.*

If the plaintiff has accepted an assignment of the bail-bond, the court will not grant him a rule upon the sheriff to return the writ. *1 Wilson, 223. Ladbroke v. Stone.*

When rule to set proceedings aside for irregularity and stay proceedings in the mean time is obtained, the proceedings are suspended for all purposes till the rule is discharged.

A rule having been obtained to shew cause, why the bail-bond should not be given up to be cancelled, on filing common bail on the *insufficiency of the affidavit* to hold to bail, and why all proceedings should not be staid in the mean time; 28 *Jan. 1791*, the rule was discharged, the affidavit being sufficient. On a subsequent day another question arose on the effect of the rule relative to the staying of the proceedings; for on a supposition that as the rule was discharged the proceedings were not suspended for any other purpose than that of disposing of the rule, the plaintiff took an assignment of the bail-bond at the expiration of the time that the defendant originally had to put in bail. *Court* (after consulting the master) agreed, that the proceedings were totally suspended by an act of the court, and made the rule absolute to set aside the bail-bond, having been made too soon.

N. B. The defendant had the same time to put in bail after the rule was discharged, as he had before. *Swayne and another v. Crammond, 4 Term Rep. 176.*

Sheriff, at the request of plaintiff, to assign the bail-bond.

By *stat. 4 & 5 Ann. c. 16. s. 20.* it is enacted, that the sheriff, at the request and costs of the plaintiff, or his lawful attorney, shall assign to the plaintiff the

the bail-bond, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed, be *duly stamped before any action brought thereon*; and, if forfeited, the plaintiff may, after such assignment, bring an action thereupon in his own name, and the court may give such relief to the plaintiff and defendant in the original action, and to the bail, on the said bond, as shall be agreeable to justice and reason; and each rule of court shall have the effect of a defeazance to such bail-bond.

If the plaintiff die before the taking of assignment of the bond, proceedings thereon will be set aside. *If plaintiff die.*
Hutchinson v. Smith, 7 Mod. 240.

If the bail are not put in, or if excepted against, and do not justify in due time, the plaintiff's attorney (if the writ be in *Middlesex*) may apply to the sheriff's office in *Took's Court, Curfitor-street*, if in *London*, to the *secondary's office*, in *Grocer's Alley, Old Jewry*, for the assignment of the bond, and, on payment of 5s., the under-sheriff assigns the same. But if the writ be in the *country*, then he must apply to the under-sheriff there, who sends the same to his agent; the usual charge is 6s. 8d. The sheriff may assign the bond in any county. *Str. 727. Gregson v. Heather.* *Assignment of the bond.*

Of the Action on the Bond.

No action can be brought before the bond is forfeited, and before the writ is sued out, the assignment must be stamped with a double 6d. pursuant to the act, s. 20. but the bail nor the principal are not to be held to *special bail*, for that would occasion bail *ad infinitum*. *No action on the bond, till it is forfeited, nor is there to be special bail.*

N. B. The plaintiff is generally named *assignee to the sheriff*, and the action must be brought in the *same court* wherein the *original writ* was sued out; for that court only hath jurisdiction and cognizance of the action. 3 *Burr.* 1923. *Walton, ass. v. Bent, 1 Burr.* 642. otherwise the parties could not have the relief intended by the statute. Proceed exactly the same as in common cases.

But if the *sheriff* bring an action *himself* on the bail-bond, he may bring it in a *different court*, than that where the original action was. *H. Black. Rep. 631.* *If sheriff sue on the bond.*

Venue.

If the *plaintiff* himself sue as *assignee* of the bond, he may lay the *venue* in *any county*. *Str. 727. Ld. Ray. 1455. Gregson v. Heather.*

Executors of assignee.

The bail-bond may be sued by the executor of the assignee.

If an attorney in the bond.

If an attorney be in the bond, the action must be brought in *the same court* where the *process* was issued; for by his entering into such bond, *he waives his privilege*, whether sued *jointly* or *severally*. *Barnes, 117.* therefore he may be sued as a common person.

When the Bond is to stand as a Security.

In case the defendant by neglect has suffered the plaintiff to take an assignment of the bond, and he *has lost a trial*; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, *if it be in term time*; if in *vacation*, he may apply and obtain a judge's order, which will be granted, upon *putting in and perfecting bail*, *paying the costs incurred*, *receiving a declaration in the original action*, *pleading issuably*, and *taking short notice of trial*, *so as not to delay the plaintiff*, and *consenting, in case the plaintiff has lost a trial, that the bond stand as a security*. But this court has not yet said, that the plaintiff shall take judgment on the actions upon the bond, although the practice in the common pleas be so, which is very expensive.

The bond shall stand as security, although no proceeding in the original action for two terms.

Writ was returnable in *Easter term*, bail-bond taken, and no proceedings thereon till *October 24*, when the bond was assigned, and special bail was put in the next day. It was insisted that plaintiff ought to have delivered a declaration *de bene esse*, and thereby quickened defendant. But the court held, he was not bound so to do, and that defendant was in the first fault, whereby plaintiff lost a trial; so defendant was forced to let the bail-bond stand as a security. *Str. 1262. Merryman v. Carpenter.*

The plaintiff had proved his debt under a commission, as bail was not put in pursuant to the condition of the bond, the plaintiff taking

The defendant was on 18th *July 1783* arrested on a bill of *Middlesex*, and returnable on *Thursday* next after the morrow of *All Souls*, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff 12th of *August* proved his debt: the defendant did not put in bail above, as he ought, *four days after the return*, nor did the plaintiff proceed by filing a declaration:

claration: the defendant not having obtained his certificate, plaintiff, 30th April 1784, took an assignment of the bond, sued out and served writ thereon, and declared 1st May. Defendant laid these facts before the court, and moved to set aside the proceedings; upon shewing cause, it was alledged, that the case in 2 Str. 1262. was in point: and on the part of the defendant, it was contended that the plaintiff not having delivered a declaration *within two terms*, he was out of court, and therefore ought not to take the bond; and that his having proved his debt under the commission, he had waived all proceedings. But the court held, that nothing was a performance of the condition of the bond, but putting in bail above, and discharged the rule. *Carmichael v. Chandler.*

the assignment (although two terms had elapsed), was held good.

What performance of the bond.

Bail were put in on the 22d Nov. 1794; exception on the 23d and the bail were not justified.—The plaintiff took the bond on 7th January, and on 21st of same month, the bail not having justified, surrendered the principal. *Rule why the proceedings on the bond should not be stayed on payment of costs*—on shewing cause, the case of *Harrison v. Davis* was cited. *Curiam.* The practice now settled is in favor of the present application on payment of costs: for that the plaintiff had the body of the defendant, which is all that he could have had, if the bail had justified before they had surrendered the principal, and therefore there was no injury done to the plaintiff. *Rule abs. Meysey v. Carnell, 5 Term Rep. 534.*

Proceedings stayed on the bond on payment of costs, though the bail surrender the principal without having justified.

The facts were in *Harrison v. Davis*, as stated by Mr. Kenyon in *M. T. 1770*, *That defendant had been arrested, and gave a bail-bond, after which and before the return of the writ, he had surrendered himself to the sheriff.* The court held, that nothing can be a performance of the condition of the bond but putting in bail. 5 Burr. 2683. and discharged the rule *why the proceedings on the bond should not be stayed with costs.*

Surrender to the sheriff after bail-bond given, bad.

Motion to stay proceedings on the bail-bond on payment of costs, and the sum sworn to, (*E. T. 1774*,) it appeared by the plaintiff's affidavit, that he might have proceeded to trial, the sittings after last Hilary term, that defendant did not die until after that time, *Cur.* held the practice to be, that where the plaintiff might have had judgment against the original defendant,

Where plaintiff might have had judgment against the principal, bail are liable on the bond, though he die.

ant, the bail below are liable for the *whole debt and costs*, and here he might have had such judgment. Rule discharged. *Orton & al. assignees, v. Vincent et al. bail of Bedford, Cowp. Rep. 71.*

If defendant dies.

But where the defendant dies before the plaintiff could have had judgment against him, if there has been no delay in putting in and perfecting bail, the court will relieve the bail on payment of costs only. *Ibid.*

There are no proceedings in the original action, after the assignment of the bail-bond.

When bond is void.

If writ be returnable at a day out of term, the bail-bond taken on it is void, and that without plea. *Str. 399. Mills v. Bond.* Therefore may be set aside on motion.

Bail to the sheriff may put in bail, and may render defendant.

The bail to the sheriff may, at the return of the writ, put in bail before a judge (against the defendant's consent), in order to perform the condition of the bail-bond; and may take up the defendant, and surrender him in discharge thereof. *Str. 876. Berchere v. Colson.*

Terms on which the Court will stay Proceedings on the Bond, where no Trial is lost.

Bail may render after bond assigned before justification.

Bail may now render the principal after bond assigned and before justification; and afterwards may move to stay the proceedings against them on payment of costs. *Edwin v. Allen, 5 Term Rep. 534.* So is the practice in the Common Pleas.

The rule in this case is, that whenever the defendant is guilty of a neglect in not putting in bail in due time, by which the bond becomes forfeited, the notice (in case the party means to put in bail in order to stay the proceedings on the bond) should be, that he will put in and perfect bail, and the plaintiff may oppose the bail in court, without its being a waiver of the bond. *Boldero v. Gray, Cow. 769.*

Immediately, on the bail being served with process, give notice to put in and perfect bail (two days); on the same day bail is perfected, move the court (if in term time) to stay the proceedings, (on an affidavit that bail are put in and justified,) against the bail on payment of costs; and in the mean time all proceedings be stayed against them. This motion is made in the *original action*. It is a rule nisi; draw up the rule for the allowance

ance of the bail with the rule nisi, and serve them both together; then proceed afterwards to make the latter rule absolute; get the costs taxed and paid, otherwise plaintiff may proceed. But if it is in *vacation time*, then put in *bail above*, and take out a summons in the original action to stay the proceedings against the bail on payment of the costs, which pay as soon as taxed.

If the plaintiff has been delayed in the action the court will impose terms on the defendant of *pleading issuably*, &c. taking short notice of trial for the last sitting in the term, or if the trial is postponed until after the term, of giving judgment as of the term, in case a verdict be given for the plaintiff. In fact to put the plaintiff in the same condition he would have been, in case bail had been put in, in due time.

If the Bond be assigned irregularly, how to proceed.

If the bond be irregularly signed, move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts, "*the writ having issued returnable on, &c. defendant's arrest, bail being put in above on such a day, and notice given, that the bail were served with writs returnable, &c. and that the bond was assigned such a day.*"

How to proceed if irregularly assigned.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief*. *Salk. 519.* Nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer*. *3 Term Rep. 572. Salter, qui tam, v. Shergold.*

Cannot plead in abatement.

The irregularity may be in the *writ*, as a bad return in the affidavit, or in the arrest, exception to the bail, or to the bond itself, or that it was put in suit before it became forfeited; in either of these cases the irregularity must be stated in the affidavit, and a copy of the writ itself, if that is complained of, should be annexed, so of the affidavit to hold to bail.

If irregularity in the writ or affidavit to hold to bail, &c.

If an assignment be made of the bond and proceedings be had against the bail even to judgment and execution against them, where the principal died between the arrest and the return, day of the writ, court will set same aside. *Hutchinson v. Smith, 8 Mod. 240* So if the bond be assigned after the death of the original defendant, the court will stay proceedings against the bail. But if it appears that the plaintiff knew not of

If principal die between the arrest and return of writ, court will stay proceedings if bond has been put in suit. So if assigned after death of principal.

the death of the principal, the bail shall pay costs.
1 *Com. Dig.* 492. 374. *Kingston v. Holloway*.

What is a waiver
of proceeding on
bond.

After regular bail put in, if the plaintiff except to them, it is a waiver of the proceedings on the bail-bond. Allowed by the master to be the universal practice. *Cowp.* 769: *Boldero v. Gray*.

Of the Proceeding against the Sheriff to compel him to return the Writ, and bring in the Body.

IT appears by the 13 *Edw. 1. c.* 39. & 23 *H. 6. c.* 10. that sheriffs of the different counties were very tardy in returning their writs in due time; and by the former statute it is ordained, "that a complaint should be made to the justices, and a writ should go unto them to inquire, whether such writ was executed or not; and if executed, and not returned, the demandant should have his damages awarded."

By the latter, "if sheriffs return upon any person, cepi corpus, or reddidit se, they shall have the bodies at the return of the said writ."

By rule, *Easter, 6 Jac. 1.* "Every sheriff shall, after term, return into court all writs, and in default expect judgment for contempt."

Notwithstanding which, sheriffs, bailiffs of liberties, and their deputies, delayed execution of process, and return thereof; for preventing of which, a rule was made in *Mich. term, 1654*, whereby the court ordered, "if it should appear that any such officer should wilfully delay the execution or return of process, or execution, or having levied money, should detain it after the return, besides the ordinary course of amercement, &c. an attachment, &c. should be as the case requires."

Special bailiff
appointed, sheriff
need not return
his writ.

If a special bailiff be appointed on the nomination of the plaintiff, the latter must take the consequence of the act of the former; therefore the plaintiff cannot call on the sheriff to return his writ, if he should, the sheriff may move to discharge the rule. *De Moranda v. Dunkin, 4 Term Rep.* 119.

If bond
assigned.

If he accepts the assignment of the bond, and the bond is valid, he cannot rule the sheriff; but if the bond is void, he may then rule the sheriff. *Ld. Brooke v. Stone, 1 Wils.* 223.

How

How to proceed to compel Return of Writ.

Ordered, that unless every sheriff shall return every writ issuing out of this court directed to him, and bring into court the body of every defendant taken by virtue of such writ within *six days next after the service of a rule of this court upon such sheriff, or his undersheriff*, for the returning any such writ, or bringing into court the body of any such defendant, an attachment shall issue against such sheriff, without giving a day to shew cause against such attachment. *R. T. 5 & 6 Geo. 2.*

Sheriff to return writs and bring the body within six days.

Ordered, that every rule to be made for the sheriff of *Middlesex* and the sheriffs of *London* to return writs, or to bring into court the body of any defendant, be made for such sheriff, &c. to return such writ, and bring into court the body of such defendant, &c. within four days next after service thereof.

Sheriffs of London and Middlesex to return writ and bring in the body in four days.

N. B. This rule made no alteration as to other cities, towns, or counties, therefore they have six days as heretofore.

It is ordered, that in future all writs shall be returned by the sheriff on the day on which the rule for returning the same shall expire; and in default thereof, the plaintiff shall be at liberty to move for an attachment on the next day. *R. M. 32 Geo. 3.*

Sheriff to return the writ the day on which the rule expires,

This rule arose out of the case of *The King v. The Sheriff of Surrey*, where the sheriff had not returned the writ till the morning of the 7th day, but before the sitting of the court. To remedy which, the above rule was made.

If the plaintiff be dissatisfied with the bail taken by the sheriff, he may, upon the return day of the writ, get a rule from the clerk of the rules to return the same; pay 4s. 6d. serve copy on the deputy secondary (if in London), the office in *Grocer's Alley*, if in *Middlesex*, at the sheriff's office, on Mr. *Burchall*, or Mr. *Cater*; shew the original rule (on which copy put the officer's name who arrested the defendant), and at the expiration of the rule, go to the treasury chamber, *Westminster-hall*, search the *custos brevium* there, for return of the writ; if no return, move for an attachment against the sheriff upon this affidavit.

How to compel, &c.

A. B. of, &c. maketh oath and faith, that he did on the 13th day of *April* instant, serve Mr. *Burchall*, who is, or acts as the deputy sheriff of the county of *Middlesex*,

Affidavit of service of the rule and search at the *custos brevium*.

Middlesex, with a true copy of the rule hereunto annexed, and at the same time shewed him the said original rule: And this deponent further saith, that he did this morning search, with the *custos brevium* of this court, for the return of the bill of *Middlesex* (name the writ) issued in this cause, but the same was not filed with him.

N. B. The search must be made of the term in which the writ is returnable.

Service on the agent.

It is held, that the service of a rule to return the writ on the undersheriff's agent in town, is not sufficient. *The King v. Coles, Dougl. Rep. 420.*

Election of the plaintiff to proceed by taking out the second rule, or the bond.

If the sheriff on the rule returns his writ, the plaintiff has it in his election, in case no bail is put in due time, either to take an assignment of the bond, or rule the sheriff to bring in the body; but if he rule to bring in the body, he cannot afterwards proceed to assign the bond.

How rule to be served.

To bring the sheriff into contempt, the rule must be served on himself in the country, or his undersheriff (except those sheriffs who have their offices in town, and who agree to accept such rule at those offices, as the sheriff of *Surry*).

How to compel Sheriff to bring in the Body.

Rules must keep pace with the defendant's time to put in bail.

It is settled that the rule to return the writ, and bring in the body, must keep pace with the defendant's time to put in bail, therefore if he has four days to put in bail, or six days, the rule to bring in the body cannot be taken out until the *four* or *six* days are expired, for the putting in bail above by the defendant; but if the defendant does not put in his bail in *due time*, (according to the limited time), and the sheriff has returned his writ *cepi corpus*; a rule to bring in the body in that case, may be obtained the *next day* and served.

Therefore if bail is put in, in due time, the writ being returned *cepi corpus*, first except against them, and serve notice thereof, then obtain the rule to bring in the body from the clerk of the rules; pay 4s. 6d.; serve the undersheriff as before with a copy, and shew the original rule; if the bail are not justified in *due time*, viz. on the expiration of the rule, the next morning, make affidavit of the service thereof, and move the court for an attachment; fee to counsel, 10s. 6d. Indorse on the affidavit, *To move for attachment*

ment against the sheriff of Middlesex for not bringing in the body, pursuant to the rule annexed.

The sheriff to save himself on receipt of the rule to bring in the body, may put in bail for the defendant against his consent, and justify same. For *Lee, C. J.* said, the sheriff must either bring in the body, or justify good bail in court, for the plaintiff is not concluded by his having taken a bail-bond. *Wolfe v. Col-lingwood*, 1 *Wilf.* 262. The sheriff takes bail at his peril upon the stat. *H. 6. per Denison, J. Ibid.*

The writ of *latitat* was returnable the 1st June, 26 Geo. 3. in a country cause. sheriff ruled to return it 2d; the 8th he returned *cepi corpus*, upon which the plaintiff on *same day* served him with a rule to bring in the body, and on 15th obtained an attachment, the court held the proceedings to be regular; although it was objected, that the sheriff had *all* the 8th to return the writ, and that the rule to bring in the body should not have been served till the 9th: for in this case, the time for putting in bail *had expired, before* the service of that rule. *Parker v. Wall*, *M.* 26 Geo. 3. *Tidd* 162.

On the 19th of November, being the return day of the writ, a rule was taken out to return it, which expired the 23d, *Saturday*; that morning, the sheriff filed his writ and return *cepi corpus*; on the evening of the *same day*, the sheriff was served with a rule to bring in the body. It also appeared that on the 23d of November notice of bail was given; *after* the service of the rule to bring in the body, and on *Monday* the 25th they were excepted to; on the 26th notice of other bail was given to justify the first day of this term, being *Hil.* 34 Geo. 3. On the last day of the last term, an attachment was granted for not bringing in the body: *Rule to set aside the attachment for irregularity*, on the ground that the plaintiff ought not to have ruled the sheriff to bring in the body *until the 24th*, the day *after* the *expiration* of the rule to return the writ. Court said, the sheriff had the *whole* of the 23d to return the writ, and that of course he could not be attached for not obeying the rule, which ought not to have issued. *Rule abs.* *Hutchins v. Hird*, 5 *Term Rep.* 479.

The *sheriff's bail* may take the defendant, and surrender him, they are his bail, and whether with or without consent is immaterial; and on a *rescue by the principal*,

Sheriff to save himself may put in bail.

If bail be not put in in due time, the rule to bring in the body may issue *same day* rule to return the writ expires.

Sheriff ought not to be ruled to bring in the body, until the day *after* the expiration of the rule to return the writ, if he be attached for not obeying the rule, the court will set aside the attachment for irregularity.

Sheriff's bail may take defendant and surrender him.

principal, Lord Kenyon held, that if defendant resisted the bail, it was at his peril, it would be so even in the case of death; and had either of the bail been killed, all the defendants would have been guilty of murder. *Rex v. Butcher & al. Peake's N. P. 169.*

Affidavit of service of rule to bring in the body to move for attachment.

^a If in Middlesex, say,

"Mr. Burtball, or Mr. Cater."

^b deputy sheriff of the county.

John Taylor, clerk to Samuel Rogers of Fleet-street, London, gentleman, attorney for the plaintiff in this cause, maketh oath and faith, That he did on the day of instant, personally serve Mr. Hill^a with a true copy of the rule hereunto annexed, and which said Mr. Hill is or acts as the deputy^b secondary of the compters, and at the same time shewed him the said original rule; and this deponent further faith, That bail above was put in, but that the same is not perfected.

Rule for attachment.

In the evening get the rule at the clerk of the rules for the attachment, carry it to the crown-office, and one of the clerks there makes out your attachment; pay 13s. 4d. *N. B.* No one particular clerk in court does this, therefore the general rule is, to take your own clerk.

Affidavit for attachment where bail is put in, but not justified.

And this deponent further faith, That the said defendant did put in bail above, but hath not justified the same, and the rule hereunto annexed since the service thereof is expired.

When you have got attachment from the crown-office, make out bill of costs, adding the fee of 2l. 2s. and 2s. 6d. for the warrant, take same to the coroner, if in London, Mr. Shelton, if in Middlesex, Mr. Walter of Shadwell, or Mr. G. Hodgson of Charles-street, St. James's-square, who will grant a warrant thereon.

May rule the coroner,

Upon the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get at the crown office, and serve him with copy; if he does not return it, make affidavit thereof, and the court on motion will grant an attachment, and order it to be directed to two *elisors*, being two or more persons named for that purpose by the master.

Affidavit when no bail at all put in,

J. W. of, &c. maketh oath and faith, That he did, on the day of instant, personally serve Mr. Hill, who acts as deputy secondary of the compters, with a true copy of the rule hereto annexed, and at the same time shewed him the said original rule; and

and this deponent further faith, that no bail above has been put in for the said defendant in this cause.

An affidavit to support a rule for an attachment of contempt, must state *personal service*, and that the original rule was shewn at same time. *The King v. Smithies*. 3 Term Rep. 351.

If the rule for the allowance of the bail be not served, an attachment may be moved for. *Rex v. Sheriff of Middlesex*, 4 Term Rep. 493. Vide title *Special Bail*.

How to proceed if Sheriff be out of Office.

By the stat. 20 Geo. 2. c. 37. s. 2. No sheriff shall be liable to be called upon to make a return of any writ, or process, unless he be required so to do, within six months^a after the expiration of his office. The months are lunar months; the day of the sheriff quitting his office is to be reckoned as one, *Dougl.* 463.; and that he cannot be ruled to return the writ, after the six months though requested before. 2 Term Rep. 1. *Rex v. Jones*.

Sheriff not liable to be called on, after 6 months to return his writ.

A rule was issued three days previous to *Michaelmas* term, and intituled of that term; the sheriff did not obey the rule; an attachment was granted, and the court set it aside as irregular and improper. *Rex v. Sheriff of Cornwall*, 1 Term Rep. 552.

A rule to return writ previous to term is bad,

The sheriff being ruled to return the writ, either does or does not return it. If there be no return, it is a contempt of the court; for which, the constant course of proceeding is by *attachment*, whether against the present or late sheriff. For as to the late sheriff, he ought in strictness to have returned the writ, before he was out of office, and therefore the contempt was actually committed whilst he was a servant of the court. *Dougl.* 464. *The King v. Adderley*.

Mr. J. Buller said, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not to impose a fine to the amount of the whole debt; though in order to proportionate it to the actual damages, he thought they must be ascertained by a jury. *Ibid.*

As the sheriff is not bound to return his writ after he has been six months out of office, therefore if he is out of office, before you call on him for a return of the

How to proceed if sheriff out of office.

^a Lunar months, or six times 28 days.

writ, you may *within the six months* get a rule upon him (naming him as the *late sheriff*) to return the writ, which is to be served at the same office as before mentioned if in *London* or *Middlesex*, in the country his undersheriff; and if he returns *cepi corpus*, then in order to compel him to bring in the body, you may now have a rule for that purpose, according to the following rule of court, which is better than proceeding by *distingas*:

New rule that late sheriff shall bring in the body by a rule.

It is ordered, that from and after the last day of this term, where any sheriff before his going out of office shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. *R. T. 31 Geo. 3.*

If bail not justified in due time, or render,

If the bail be not justified in due time, and the defendant be not rendered in their discharge, make affidavit of the service as before, and obtain an attachment, which is to be directed to the *coroners* of the county where the writ issued, or if in *London*, to the *coroner*.

Notes of Cases.

Sheriff not liable to be called on to return process unless within 6 lunar months, and the day on which he goes out of office is to be reckoned as part of the *six months*.

The defendant, who was sheriff of *Warwickshire*, went out of office 12th *Feb.* 1780, at four in the afternoon, and was not served with the rule to return the writ until the 30th of *July* following. Rule was made for an attachment for not returning the writ. The sheriff moved for a rule why a *superfedeas* should not issue for not obeying the first rule: *February* in this year consisted of 28 days, and therefore if the day on which the office expired was to be reckoned in, to make up the *six months* allowed by stat. 20 *Geo. 2. c. 37. s. 2.* the rule was served a day too late, and the defendant was entitled to the protection of the statute. Lord Mansfield, The old sheriff on the 12th of *February*, turned over by indenture to his successor, all unexecuted process. The act purports to be made for the ease of sheriffs with regard to the return of process. The act of quitting the office by turning over the writs, &c. to the new sheriff, was done by the defendant on the 12th of *February*. This being a penal proceeding against the defendant, who is entitled to the most favourable construction of a statute expressly made for the ease of sheriffs, we think the day of his leaving the office is to be

be computed as part of the six months, and therefore the rule to return the writ came too late. Rule for superseatas made absolute. *The King v. Adderley*. *Dougl. Rep.* 463.

A sheriff is not liable to an attachment for not returning his writ, if he is not called upon by a rule of court so to do, *within six months after the expiration of his office*; notwithstanding he was requested by the party to return it before the six months were expired. *Rex v. Jones, late Sheriff of Carmarthenshire, 2 Term Rep.* 1.

An attachment having been obtained against the sheriff of *Middlesex*, for not bringing in the body in a cause, *Robins v. Hall*; rule was made to set it aside, because defendant died before attachment issued, though not till *after* the contempt incurred. Court was of opinion, that as the sheriff was in contempt *before the defendant's death*, the attachment was regularly issued. And though the original cause abated by his death, yet that was no reason for setting the attachment aside, since he was in contempt before. *The King v. Sheriff of Middlesex, 3 Term Rep.* 133.

On a rule to set aside an attachment against the sheriff for not bringing in the body.—On 1st of *May* bail was put in; the 14th, notice of exception given; the same day a rule to bring in the body was served. Notice was given on the 15th that two other bail would be put in and justify the 17th. Bail not having justified on the latter day, there was another notice to justify the 20th; on which day one justified, the other rejected, and further time was given to add another bail. On 21st notice was given that the other bail would justify the next morning; but, he not attending, the defendant gave another notice that the other bail would justify the 24th, and notice was also given that the defendant would surrender in discharge of his bail, which he did accordingly. On shewing cause, it was contended, that the surrender was irregular, because the committitur was not entered until the 23d, nor the bail-piece filed until that time, when there was no bail in a condition to surrender the principal, one only having justified, the other rejected. *Per Curiam*: The master says that there should have been a rule to strike out the two first bail, whose names stood on the bail-piece; and that until that was done, they might surrender

Sheriff not liable to return writ although requested before the six months without a rule.

If sheriff be in contempt before defendant's death, an attachment may issue.

If on exception to bail, notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail-piece, the former may surrender the principal.

Court ordered attachment to stand as a security.

If sheriff fixed, and defendant has merits.

Bail put in after sheriff fixed, attachment set aside, and no benefit from the attachment.

Attachment refused for not taking replevin-bond.

Sheriff liable only to sum sworn to.

Bail to the sheriff.

surrender the principal. Rule abs. *Rex v. Sheriff of Essex*, 5 Term Rep. 633. E. T. 34 Geo. 3. June 2d, 1794.

An attachment having issued against the sheriff, and the debt and costs paid by him to the coroner, motion that further proceedings be stayed; *Cowper*, who shewed cause, contended that the plaintiff had lost a term^a, and therefore that the attachment ought to stand as a security, in case the plaintiff should recover a verdict. The court ordered the attachment to remain in the office as a security for the plaintiff's debt, and defendant to consent to trial at the sittings after term. T. 15 Geo. 3. *Gravett v. Williams*, 4 Term Rep. 352.

If the sheriff is fixed, and the defendant has merits, he may apply to be let in to the trial; and, if granted, the attachment will be ordered to lie in the office in the mean time, and defendant must be upon terms of taking short notice of trial, &c. according to the following case.

Morgan moved to set aside the attachment against the sheriff on payment of costs, bail having been put in, and no trial lost, on the ground that the court would grant this of course as no trial had been lost. Lord Kenyon said, that the master had furnished them with a note of *Gravett v. Williams*, and reported the practice to be, that the attachment against the sheriff ought not to stand as a security, as no trial had been lost. And he desired that such might be considered to be the practice in future. Rule absolute. *Hill v. Bolt*, 4 Term Rep. 352. Vide the case of *Overton*, title Special Bail, where the court refused to let the bail justify, after the sheriff was fixed.

An attachment was refused against a sheriff for neglecting to make a replevin-bond, because the party injured might maintain an action. *The King v. Lewis*, 2 Term Rep. 617.

It is said the sheriff standing in the same situation as the bail above, is only liable to payment of the sum sworn to, together with the costs. *Stackey v. Pele*, E. 25 Geo. 3. Tidd 166. Contra C. P. 1 H. Bl. Rep. 233. But in *Peterkin v. Sampson*, in 25 Geo. 3. and *Sheddon v. Carny*, E. 29 Geo. 3. it was determined, that bail to the sheriff, are liable to the extent of the penalty in bail-bond, to satisfy the full debt and costs,

^a Meaning that he could not try his cause in term so as to have had a judgment of the term.

although

although he cannot take the bond in more than double the sum sworn to. *Dougl. 320. in notes.* So is the C. P. determination, 1 *H. Black. Rep. 233.* though if they enter into the recognizance, they are not liable beyond the sum sworn to. *Jackson v. Hassel, Dougl. 329.*

The defendant died after the rule expired to bring in the body, and an attachment was granted. Motion to set it aside, court was of opinion, that as the sheriff was in contempt before the defendant's death, the attachment was regularly issued; and though the original cause abated by his death, yet that was no reason for setting attachment aside, since the sheriff was in contempt before. *Rex v. Sheriff of Middlesex, 3 Term Rep. 133.*

If sheriff is fixed for not bringing in the body, though defendant die before attachment, yet he is liable.

Common Bail.

AT common law, the plaintiff and defendant must in general have appeared in person, and could not have appeared by attorney, without the king's special warrant, by writ or letters patent. And now by *stat. West. 2. c. 10.* a general liberty is given to the parties of appearing by attorney. Yet there are certain persons, such as *ideots, feme coverts, &c.* who, for want of legal discretion, are incapable of appointing an attorney, and must therefore appear in person; and any one else may still appear, and prosecute or defend his suit, in the same manner as is usually done by attorneys and prisoners. *Say. Rep. 277. 2 Inst. 376. Gilb. C. P. 32.*

Appearance is the first act of the defendant in court, which is the act of the court itself, as is evident from the language of the bail-piece, 1 *Salk. 8.* and therefore the defendant may appear before the return of the writ. 1 *Wils. 39.*

Since the *stat. 12 Geo. 1.* common bail is reduced to a mere appearance; the sureties in this case, being imaginary persons.

Common bail is to be filed for the casual ejector in ejectment, before judgment be signed against him. *Ejectment. R. M. 33 Car. 2. T. 14 Car. 2.*

An attorney subscribing process, be compelled to cause an appearance, or be liable to an attachment. *Attorney: R. M. 1654. sect. 10.*

By

Common bail to be filed in eight days.

If the debt be under 40s. defendant on appearance may move to stay the proceedings.

Warrant to be filed.

Warrant.

Common bail-piece. 1s. 6d. stamp.

By stat. 5 Geo. 2. c. 27. where the defendant is served with a copy of the process, he must cause common bail to be filed on the return, or within eight days after such return. Sect. 1.

The defendant, although under short notice of trial, moved to stay the proceedings, the plaintiff's attorney acknowledging the debt was no more than 1l. 11s. 6d. *Lord Kenyon*: This is a very general question which concerns the practice of the court, whether it shall be permitted to parties to sue in the superior courts for such small sums as those under 40s.: now that is expressly prohibited by act of parliament, 6 Ed. 1. c. 8. Therefore on consideration, we are of opinion, that the rule should be made absolute, but not with costs, as this is the first application of the kind. *Rule abs. Kenward v. Jones*, 4 Term Rep. 495. The defendant ought to enter his appearance, I think, before he moves. *Sed quære*.

By stat. 25 Geo. 3. c. 80. a warrant or memorandum to defend, must be delivered to the clerk of the common bails, with the bail-piece upon a 2s. 6d. stamp, who, for the ease of the practisers, has them ready printed in this form:

In the court of King's Bench.

London, } J. F. is retained to defend by Luke
to wit. } Martin, as his attorney, at the suit of
Thomas More.

Entered or filed of record } J. T. Attorney, (if
this day of in the } by an agent, add,) by
year of the reign of } L. M. his agent.

Easter Term, in the 36th year of the reign of
king Geo. III. Mansfield and Way.

London, } Luke Martin having been served with
to wit. } process, is delivered to bail to

John Doe, of London, yeoman,
and

Richard Roe, of the same place,
yeoman.

J. T. Attorney, } At the suit of
21 April 1796. } Thomas More.

To be written on parchment treble six penny stamp; file it with Mr. *Nelson*, the clerk of the common bails, at the King's Bench office, with the warrant or memorandum as before; pay 1s. 2d. in term time, and 1s. 6d. in vacation, to be filed *the term the writ is returnable*. *Rep. Temp. Hard. 138.*

To entitle defendant to sign a *non pros*, common bail must be actually filed *in the term* in which the writ is returnable.

Sunday is not to be accounted *one* of the days, if it happens to be the *last* of the eight days; as, for instance, if a writ be returnable on *Saturday*, the defendant has the whole of the *Monday* to file his common bail. *Vide 1 Burr. 56. Shadwell v. Angel.* When common bail is filed, the court is then said to have possession of the cause.

If Sunday intervenes.

If an attorney undertake to appear, the court will compel him so to do, even though he was imposed on when he made the undertaking, *Lorymer v. Hollister*, 1 Str. 693. and should he refuse, an attachment will be awarded. The undertaking must be *an express undertaking to appear*, in writing, and signed. Str. 445. *Loft. 192.* If he receive a declaration, unless accepted *on condition*, he must enter his appearance. 1 Lill. P. R. 102. If he takes on himself to appear, the court looks no further; whether he has authority or not, the party is left to his action. 1 Salk. 87. *Anon.*

Attorney undertaking.

It is ordered, that all clerks and attornies for the plaintiff, upon signing of judgment by default, or *non sum informatus*, shall pay to the secondary of this court 1s. 6d. for the common bail, unless it was before filed, and the said 1s. 6d. shall be allowed the plaintiff in his costs. *R. Trin. 4 W. and M.*

Common bail to be filed upon judgment by default or *non sum informatus*.

Of filing Common Bail according, &c.

The stat. 2 Geo. 2. c. 27. enacts, that in case the defendant does not file common bail within *eight days* after the return of the writ, the plaintiff may do it for him, on an affidavit being made of the service; in such case these words must be inserted on the bail-piece, under the attorney's name; "*filed according to the statute.*" *R. M. 10 Geo. 2. Reg. 1.*

When to be filed by defendant, or plaintiff may do it.

In

In the King's Bench. *Thomas Moore*, plaintiff,
and

Luke Martin, defendant.

Affidavit of service of process.

^a *Latitat, alias capias, or pluries capias.*

To state name of writ.

When plaintiff to appear.

Before whom sworn.

May be filed by plaintiff without the 2s. 6d. stamp.

The practice to sign judgment on 2d of Nov. before the essoign day where bail is filed between the 2d and 6th of Nov.

John Wills, clerk to *Robert Flower*, of the Inner Temple, London, gentleman, attorney for the above named plaintiff, maketh oath and saith, That he did, on the 8th day of *April* instant, personally serve the above defendant with a true copy of a bill of *Middlesex*^a; which appears to this deponent to be regularly issued out of this honourable court, and returnable on *Wednesday* next after 15 days of *Easter*, under which said copy was written an *English* notice to the said defendant, of the intent of such service, pursuant to the statute in that case made and provided.

Care must be taken to state the name of the writ, for saying *served with mesne process only*, was held bad, after defendant was in execution, and judgment set aside, and defendant discharged. *Lakin v. Dervall*, *Trin. 25 Geo. 3. Selt. 105.*

The plaintiff cannot appear before the ninth day exclusive after the return of the process, as if writ be returnable the 13th *April* cannot file it till the 21st.

This affidavit may be sworn before a judge of the court, or commissioner authorized to take affidavits in this court, or the clerk of the common bails, not the attorney in the cause. *Stat. 5 Geo. 2. c. 27.* In town, it is mostly sworn before the clerk of the common bails, or his deputy lawfully authorized.

By 25 *Geo. 3. c. 80. s. 22.* Common bail may be filed by the plaintiff, according to the statute, without entering or filing of record any memorandum or minute for the defendant; but no solicitor shall plead or carry on any further proceeding for such defendant (if common bail has been filed according to the statute), without filing the minute or memorandum before mentioned, under penalty of 5l. *Sect. 23.* If a defendant is added after commencement of an action, such a memorandum is not necessary. *Sect. 24.*

Common bail must be filed by the plaintiff according to the statute, before he can declare in chief. *Smith v. Painter*, 2 *Term Rep. 719.*

It is the uniform practice to sign judgment the 2d of *November*, before the essoign day in all cases where common bail is filed between the 2d and 6th of *November*, therefore where common bail was filed the 3d of

of November, and it appeared by the book that judgment was signed on the 2d, yet in fact it was not signed till *after* the common bail filed, the court held the judgment regular. *Wansley v. More*, 5 Term Rep.

65.

By rule *E. T.* 30 *Geo.* 3. The clerk of the common New rule.
bails shall mark the bail-pieces *numerically* as they are received.

In what Cases Common Bail will be ordered.

When a married woman imposes on a trader, and Married woman,
contracts on her own credit; court will not relieve in a summary way; but where it has appeared, that plaintiff knew her to be a married woman, court has discharged her. *Waters v. Smith*, 6 Term Rep. 451.

If the affidavit of the plaintiff be defective, *i. e.* swearing that the debt is due (as appears by the bond^a) as appears by the testator's books^b; to the penalty, instead of the *principal and interest* due on bond^c; or joining in one stamp, debt and *assumpsit*^d; taking out a writ where common bail has been ordered upon a former one, before the costs taxed and paid, upon a rule to discontinue^e; holding to bail one who was formerly arrested and superseded, though he gave a note for 20l.^f; for costs on a nonsuit upon a recovery in a foreign court; for malicious prosecution, where the affidavit only said, "*due upon a judgment or decree*;" upon a promise to pay after a commission issued, and certificate signed^h; upon a promise to pay two guineas *per* month after taking the benefit of an insolvent debtor's act, though part actually paidⁱ; on an old affidavit of a debt due sworn some time back^k; on a judgment after defendant hath been superseded^l; or on a second judgment (and where the maker and indorser of a promissory note are joined in one affidavit, neither can be held to bail);—where the defendant is held to bail on the judgment (*where bail has been given in the original action*), or that defendant is indebted to him in 200l. on promises, *Dougl. Rep.* 468. *Cope and another v. Cook*; or where the assignee or executor does not swear that *they believe the debt is due*; 1 Term Rep. 716.; the court can order common bail, although defendant hath put in special bail, if the case requires it^m; also if there be not *separate* affidavits filed where there

^a Str. 1157.

^b Ib. 1219.

^c Ib. 1209.

^d 1226.

^e 5 Burr. 2690.

^f Str. 1209.

^g Ib. 1218.

^h Ib. 1243.

ⁱ 3 Burr. 736.

^j Str. 1213.

^k Ib. 1270.

^l Ib. 1039.

^m 6 Term Rep.

254.

ⁿ Str. 1077.

there are *more* defendants than *one*, and the cause of action be *not joint*. *Dougl. Rep. 218. Gilby v. Lockyer. Vide title Affidavit.*

Defendant held to bail on an affidavit of debt due from three defendants as surviving partners of another deceased, was discharged on filing common bail, declaration being for a debt due from the three defendants alone.

The plaintiffs sued an original writ against the three defendants, in which was a set of counts against them, as surviving partners of *Gregory*, and another set against them *in their own right only*. Two of the defendants were outlawed, and the defendant *Mure* was held to bail in 20,000*l.* for money had and received by the *four partners, Gregory* being dead. The declaration contained counts against defendants in their own right, without stating *they were the surviving partners of Gregory*. Rule to set aside proceedings for irregularity, and why an *exoneretur* should not be entered. *Per Cur.* The plaintiffs have abandoned their right to bail by the variation between the affidavit to hold to bail, and the declaration. Rule absolute on defendants filing common bail. *Cur.* We cannot set aside all the proceedings for irregularity. If the defendants think that the variance between the original writ and declaration is fatal, they may take advantage of that, on a writ of error. The latter part of the rule to set aside the proceedings discharged. *Spalding v. Mure, 6 Term Rep. 363.*

Filing C. B. voluntarily.

Filing common bail voluntarily, invalid, unless a writ is sued out in *fourteen days* after such appearance. *R. Trin. 4 W. & M.*

Baron and feme.

If baron and feme are sued, the *baron* must appear for himself and wife. The wife's appearance is not void, though the plaintiff cannot proceed without bringing the husband into court. *1 Wilf. 264.*

If a writ be served on the defendant by wrong name, he may declare against him by right name.

If a writ be served on the defendant by a wrong name, he may be declared against by his right name *after his appearance*; but you cannot appear for the defendant according to the statute, contrary to the name in the writ. *3 Term Rep. 611. Doe v. Butcher.* In common process, I do not conceive it necessary that the declaration need state, that he was *served* by the *wrong name*. If there be an arrest and bail put in, it is necessary, because the bail-piece always states the real name of the defendant, with the addition of "*having been arrested by the name of John.*"

Common bail on a warrant of attorney.

Common bail must be filed where you enter up judgment on a warrant of attorney, on pain of 10*s.* to the box. *Hil. 1 W. & M.* And by *Stat. 25 Geo. 3. c. 80.* a memorandum or warrant is to be filed on a

2s. 6d. stamp with the clerk of the common bails, previous to entering the judgment. *Sec. 19. Vide Judgment on Warrant of Attorney.*

The court will not discharge defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest; *Nutt v. Verney et al. 4 Term Rep. 121.*; but will, if defendant becomes a peer, exonerate the bail, *Trinder v. Shirley, Dougl. 45. 1st ed.* or member of parliament, pending the suit. *Langridge one, &c. v. Flood, H. 26 Geo. 3.* Or order common bail, if special bail be not filed.

Defendant
insane.

A peer or mem-
ber.

Security for Costs.

It seems that a motion has been made often for securing to the defendant, in case he succeeds in his action, the costs. This the court refused in the late reign, unless in actions *qui tam*, &c. giving as a reason that it would affect trade, and be excluding foreigners from obtaining justice in our courts. *Lamie v. Sewell, 1 Wils. 266. Str. 126. 2 Str. 1206. 4 Burr. 2605. Boswell v. Irish, Cowp. Rep. 158.*

Formerly re-
fused.

The cases in ejectment are considered as more under the power of the court than other proceedings, and therefore the court has stayed a second, till the costs were paid of the first. *Real &c. al. v. Macay, Str. 1206.*

Lessor of plaintiff an infant, or abroad, shall name a good plaintiff or give security for costs. *1 Wils. 130. Anonymous.*

Lessor of plain-
tiff an infant.

A similar undertaking is also required in an action for the *mesne profits*, brought in the name of the nominal plaintiff, in ejectment.

Mesne profits.

If a second action appear, on all the circumstances of the case, to be vexatious, the court will order the proceedings to be stayed, until the costs of the former one are paid. *Melchar v. Halfey, Say. Law of Costs, 247. Gravenar v. Cape, ibid.* there cited by *De Grey, C. J.*

If a second ac-
tion appear
vexatious.

In an action by husband and wife, the court stayed the proceedings until the payment of costs in a former action at the suit of the husband only, it being for the same demand. *Lamley et ux. v. Sands, H. 25 Geo. 3. K. B. Tidd, 285.*

Lessor of plaintiff residing in Ireland, shall give security for costs, though ejectment is brought by the direction of chancery, where security is already given. *Denn v. Fulford, 2 Burr. 1177.*

Lessor residing
in Ireland.

Now granted.

It seems now, that this rule will be granted in all actions brought by foreigners, and for this reason, that if a verdict be given against the plaintiff, he is not within the reach of our law, so as to have process served upon him for the costs. *Pray and others v. Edie*, 1 Term Rep. 267.

If an Englishman sue in a foreign court, he must give security for costs: and therefore a like rule was made against the plaintiff, who resided at *Waterford* in *Ireland*. *Fitzgerald v. Whitmore*, 1 Term Rep. 362.

Bail before motion.

The court have decided that *bail* be put in previous to the motion, for the defendant not being in court, he is not in a situation to make the application. *De la Preve v. Duc de Biron*, 4 Term Rep. 697. E. 32 Geo. 3.

Qui tam action.
Plaintiff's poverty.

The proceeding will not be stayed in a *qui tam* action, merely on account of the plaintiff's poverty. *Cowp. Rep.* 24.

In the case of *Doe ex dem. of Selby v. Ashton*, baronet, Mr. Justice Buller said, There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs; the first is, when an infant sues, the court will oblige the *prochein amy*, or guardian, or attorney, to give security for the costs.

Residence abroad.

Secondly, Where the plaintiff resides *abroad*; in which case the court will stay the proceedings till security is given for the costs; and,

Thirdly, Where there has been a former ejectment; but there the rule is to stay the proceedings in the second ejectment, till the costs of the former are paid, and not till security is given for the costs of the second. 1 Term Rep. 491.

Lessor of full age.

If lessor is known, of full age, and resident in the country, court will not order him to give security.

If one of two defendants put in bail, and plaintiff a foreigner.

If a *foreigner* sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for costs, without putting in bail for the other. *Carr v. Shaw and another*, 6 Term Rep. 496.

A rule calling on the lessor of the plaintiff to shew cause why the proceedings in this action should not be stayed till he gave security for the costs, in case he was non-suited or a verdict given against him. This rule was founded on an affidavit, stating that in the former ejectment, the court of exchequer had obliged the lessor of the plaintiff to give security for the costs of that action. Buller, J.—The form of the present application

tion is wrong. But it is not stated that the costs of the ejectment in the court of exchequer have not been paid. *Ibid.* Rule discharged.

This mode of application may be made by summons or motion, and it is referred to the master to take the security.

Of calling for Plaintiff's Residence.

In ejectment and actions *qui tam*^a, where the plaintiff, or his lessor, is unknown to defendant, the latter may call for an account of his residence, or place of abode, from the opposite attorney by motion or summons, and if he refuse to give it, or give in a *fictitious* account of a person who cannot be found, the court will stay the proceedings until security be given for the costs. ^a Str. 637. 705.

Declaration.

THE declaration is a legal specification of the cause of action, and if the proceeding be by *original writ*, the plaintiff must declare for the *same cause* of action as is there expressed. But if the proceeding be by *bill*, then the declaration is a *mere copy of it*, and in either case, it should *correspond* with the *process*, in the *names and descriptions of the parties*: for if there be a *material variance*, the court will set aside the proceedings: Unless where the process is taken out against the defendant by a *wrong name*, and he appears by his *right name*, there the plaintiff may declare against him by the *name in which he appears*, stating that he was arrested by the other, for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial. 3 Term Rep. 611. *Boyne v. Mills*.

The substantial rules of pleading are founded in strong sense and in the *soundest and closest logic*, and so appear when well understood and explained; though by being *misunderstood* and *misapplied*, they are often made use of as instruments of chicanery. *Robinson v. Raley*, 1 Burr. 319.

It is one of the most honourable, laudable, and profitable things in our law, to have the knowledge of *well-pleading* in actions, *real and personal*. *Co. Lit.* f. 534.

The *use, nature, and design* of pleading is only to render the fact *plain and intelligible*, and to bring the matter to judgment with a convenient certainty; and in the time of *Ed. 1.* the pleadings were short, plain, and simple, ever having respect to *matter* and not to *form of words*. 1 *Inst.* 304. *H. H. C. L.* 172.

Rules respecting the Declaration.

1. The parties *demandant* or *plaintiff*, *tenant* or *defendant*, ought to be well named.
- Time. 2. So the *time* of a matter charged in the declaration ought to be certainly alledged; and therefore in *assumpsit*, the day being omitted on which the promise is made, it is bad. *Yel.* 94. *Pl. Com.* 24.
- Place. 3. So a certain place ought to be alledged where every fact material and traversable was done. *Kitch.* 226.
- Gift of the action. 4. The *gift*, and every *thing* that is of the *essence* of the plaintiff's *action*, must be set forth in the *declaration*; and herein we may lay it down as a general rule, that that seems properly to be the *essence* of the *action*, without which the court could have no sufficient *grounds* to give judgment; and this is to be determined in every *action* according to its nature. *Doctr. Pl.* 85.
- If declaration not sufficient. 5. If the declaration be not sufficient foundation to give judgment, this may be moved in arrest of judgment after verdict, because judgment cannot be given when it appears that, though the fact be found for the plaintiff, yet he has not sufficient cause of action. *Ibid.*
- No greater certainty than the thing is capable of. 6. Although the plaintiff must set forth in his declaration every material *thing*, and without which, he could not be entitled to his action; yet herein the law requires no greater *certainty* than the nature of the *thing* is capable of; and therefore if a *contract* be made in general *terms*, the *declaration* upon such *contract* may be in the same terms. 3 *Lev.* 319.
- When the thing is laid by way of aggravation. 7. Where a *thing* is laid in the declaration by way of *aggravation*, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the *gift* of the action is the *thing* itself in demand, and the *aggravation* is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of proportion to the *thing* in demand. *Cro. Jac.* 664.
7 *Mod.*

7 *Mod.* 142. *Sty.* 25. 199. 1 *Lev.* 301. 303. *Lord Ray.* 991. *Str.* 827. *Keb.* 825. 2 *Wilf.* 292.

8. If a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alledged, especially if it be not of an entire demand. 10 *Co.* 115. *Roll. Ab.* 784, 785. 2 *Show.* 103. 1 *Salk.* 133. *Vide* 3 *Burr.* 1235. If good in part.

As to unnecessary Length in Declarations.

For preventing unnecessary length of declarations, "It is ordered, that in actions of covenant, the declaration is not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion." To prevent unnecessary length in declaration.

In actions of slander long preambles be forborne, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special inducement, or colloquium. Covenant.

That in actions upon general statutes, the declaration not to repeat the statute, but to conclude against the form of the statute in such case made and provided; as in case of debt upon the *stat.* 2 *Ed.* 6. for tithes, and 32 *H.* 8. for maintenance, 21 *Jac.* of monopolies. Slander.

That in actions of debt upon judgment had in the courts of *Westminster*, to recite only the judgment; but if a judgment had by or against an executor or administrator, then the action of debt upon that judgment, to repeat the declaration and judgment. *R. M.* 1654. *f.* 13. On statutes.

Of striking out unnecessary Counts.

If it appear on the face of the declaration, or by reference to the bill of particulars, that some of the counts are superfluous, the court will order them to be expunged; and if there be any vexation, will make the plaintiff pay the costs of the application.

If there are several counts in a declaration, and precisely the same, or only a formal difference between them, and the same evidence will support each, as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the court will expunge the general counts. *Caf. temp. Hard.* 129. So if by reference to the bill of particu-

lars (which defendant may now have,) they will expunge such counts as are unnecessary.

The usual mode is to refer it to the master in the *first* instance, and the court will, on motion for his report, decide. And Lord *Hardwicke*, in *Wilkins v. Perry*, said (on a motion to refer the declaration), As you have obtained *time to plead* without applying to the court to have the counts struck out or referred to the master, which is the usual way, the rule must be discharged. *Rep. temp. Hard. 129.*

In *Dundas v. Lord Weymouth*, Lord *Mansfield* said, the length of declaration is a disgrace to the profession; and the court would animadvert upon any future instance of putting the parties to the enormous expence of setting out deeds at length, or superfluous parts of them, such expence amounted to a large sum; and the next instance that came before the court, he would inquire who drew the declaration. *Cowp. Rep. 665, 727. Price v. Fletcher.*

What a declaration in covenant need not state.

In an action against the sheriff, for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not all proved as stated, there the plaintiff shall be nonsuit. *Brislow v. Wright, Dougl. 664.*

The objects of pleading *precision* and *brevity*.

Lord *Mansfield*: I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are *precision* and *brevity*. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover. *Cowp. 665.* If he states

Impertinent.

what is impertinent, it is an injury to the other party, and may be struck out, and costs allowed upon motion. *Ibid. 727.* I remember a case where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the master, and all was struck out, except the covenant on which the action was brought, and costs paid to the amount of 100l. When I say that a plaintiff need only set forth that part of a deed on which his action is founded, I do not mean to say, that even that is necessary. He is not bound to set forth the material parts, in letters and words. It will be sufficient to state the substance and legal effect. *That* is shorter, and not liable to misrecitals and literal mistakes.

Costs.

mistakes. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the court and need not be proved. But if the very ground of the action is mistated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal: for then the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. *Dougl. Rep.* 665. *Bristow v. Wright and another*.

The process was "to answer the plaintiff *qui tam* Variance, "*pro domino rege, quam pro se ipso sequitur*:" the declaration was in his *own name only*; omitting the *qui tam* part. Court held the variance to be fatal, and ordered the proceedings to be set aside. *Canning v. Davis*, 4 *Burr.* 2417. But Mr. Justice Yates said, though the plaintiff may style himself executor, or give himself any other superfluous description in the process, and declare otherwise; yet this will not hurt, for the demand is still the same: But in this case, the very nature of the demand is altered; the process, importing a demand to the king and plaintiff, and the declaration, a demand to the plaintiff only. 2 *Black. Rep.* 722. *Lloyd v. Williams*.

In a subsequent case the proceedings were set aside where the process was to answer the plaintiffs as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a *special character*. *Meggs assignee v. Ford*, E. 25 Geo. 3.

Court said, it was not usual to insert in the bill of *Middlesex*, on what account, or in what light the party sues, as in the case of executors and administrators, the case of an assignee of a bail-bond, and the like, when the process is only *ad respondendum to A. B.* 2 *Str.* 1232. *The Weavers' Co. qui tam v. Forest*.

The *ac-etiam* in the *latitat* was for a *certain sum* in debt, and the declaration for only *half* that sum. Motion to discharge defendant on common bail. *Per Curiam*: The same strictness, which prevails with regard to original writs, does not obtain respecting others.

May declare *qui tam*, though process is not so.

The court will not on motion permit a defendant to take advantage of a variance between the sum mentioned in the

ac-etiam part of
the *latitat*, and
the declaration.

others. In order to prevent any incongruity on the record, it hath been held that the declaration must pursue the original writ; but this objection will not appear on the face of these proceedings, this action having been commenced by bill. Where indeed the plaintiff has varied the nature of his action, as where he has sued out a writ of *quare clausum fregit*, and declared in trover, or where the objection has been to the plaintiff's right of suing, as where he has taken out a writ in his own name, and declared as executor, such objections have been allowed on motion. But there is no instance where the court has interfered, on motion, for such an objection as the present, which merely goes to the sum sued for. *Turing v. Jones*, 5 Term Rep. 402. Rule refused.

As to Particular of Demand.

Plaintiff to give
defendant parti-
cular of his de-
mand.

Lord *Mansfield* thought it reasonable that in *all* cases (as well where attornies were plaintiffs, as where other persons were plaintiffs) the plaintiff ought to give the defendant an account of the particulars of his demand. *Le Breton v. Braham*, 3 Burr. 1390.

What the par-
ticular ought to
contain.

In delivering a particular under a judge's order, where there has been an account current, and payments made, for which the party means to give credit; the particular ought to contain as well all those matters for which he means to give credit, as those for which the action is brought. Lord *Kenyon*. *Mitchell v. Wright*, Esp. 2. pt. 280. Hil. 35 Geo. 3.

This is now done by summons, and Mr. J. Buller reprobated a motion, as it is a matter of course, putting the parties to more expence than necessary; and "*that in the mean time all proceedings be stayed.*"

Actions are to
proceed though
no warrant or
memorandum
filed by attorney.

No action, &c. shall be stayed, nor any judgment, sentence, &c. reversed, by reason of omission or defect in the entering or filing of record the memorandum or minute directed, but the court shall proceed the same, as if such memorandum or minute were entered or filed. Stat. 25 Geo. 3. c. 80. sect. 17.

Of Declaring.

Two ways to
proceed.

There are two ways in which the plaintiff may declare; the one *on the return day* of the writ, which is called *de bene esse*, conditionally, until special or com-
mon

mon bail be filed, or *after the day for filing common bail*, or the defendant has *justified his bail*, which is called *in chief*. If to speed the cause, the former is the best way of proceeding. And a rule to plead may be given on the same day.

If the cause be by *original*, a declaration cannot be delivered *de bene esse* till the *first day of term*. *Burgh v. Dixon*, M. 14 Geo. 2. *Crompt. 97.*

The writ was returnable the 15th of November, being the 2d return, and a declaration *de bene esse* was filed the 24th, to plead in eight days; held well delivered (though not till the 9th day), because two *Sundays* intervened. 1 *Burr. 56. Shadwell v. Angel.*

When a declaration is filed *de bene esse*, till common bail, or appearance entered, or till special bail be filed, notice that it is *so filed*, must be given to the defendant in writing. *Vide Proceedings by Original.*

Where the plaintiff holds two defendants to bail on a joint action, and declares against them severally, the court will set aside the proceedings for irregularity. *Moss and another v. Birch and another*, 5 *Term Rep. 722.* *Vide Holland v. Johnson*, 4 *Term Rep. 695*, and *Holland v. Richards*, 697.

When the declaration is drawn, ingross it on a treble penny stamp paper; charge on the back thereof 4d. *per sheet* (seventy-two words) and duty 3d. *per sheet*, warrant 4d. *R. T. 12 W. 3.* and if the plaintiff's attorney files common bail, *R. M. 5 Ann. Reg. 2.* according to the statute, he charges 7s. 2d. more.

It is ordered, that upon the appearance of any attorney, or other person, for any defendant in this court, the plaintiff's attorney shall not be bound to deliver to the defendant's attorney the original declaration; but instead thereof, shall deliver a true copy of such declaration, and that upon the delivery or tender thereof, the defendant's attorney, or other person acting for him, shall pay unto the plaintiff's attorney or other person acting for him, for the copy of such declaration after the rate of 4d. *per sheet* copyways, together with the stamps or king's duty thereon, which shall serve and be in lieu of the copy of such declaration usually made by the defendant's attorney. *R. T. 12 W. 3.*

Notice.

If two defendants held to bail in one action, plaintiffs cannot declare separate.

Declaration how prepared.

Defendant's attorney to pay for copy of declaration.

4d. per sheet, computing 72 words to a sheet, and duty.

Of

Of declaring where Special or Common Bail is filed.

How declaration
to be delivered if
common or
special bail be
filed.

It is ordered, that in every cause in which *special or common bail* be filed, and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be delivered to the defendant's attorney, who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence, refuses to pay for such copy, or if it shall happen that the abode of the defendant's attorney be unknown to the plaintiff's attorney, then it shall be lawful *to leave such copy with the officer of this court appointed for affiling declarations*; and notice thereof shall, without delay, be given to such defendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. *R. Trin. 2 Geo. 2.*

Declaration to
be paid for be-
fore plea filed.

It is ordered, in all causes depending in this court, the defendant's attorney shall receive and pay for a copy of the declaration, whether the same be delivered by the plaintiff's attorney or left in the office, before defendant be permitted to plead. *R. M. T. 10 Geo. 2.*

Of declaring when Plaintiff files Bail according, &c.

The plaintiff cannot declare in *chief*, unless common bail be filed by defendant, or he has done it for him. *Smith v. Painter, 2 Term Rep. 719. 1 Term Rep. 635, Cooke v. Raven.* And it ought to be filed the term the writ is returnable. *Rep. temp. Hard. 138.*

How to deliver
declaration if
plaintiff appears
for defendant
according to the
statute.

In all causes where a copy of the *process* of this court is served upon any defendant or defendants, and an appearance is *entered*, or *common bail* filed for such defendant or defendants, by the plaintiff's attorney, pursuant to the act, the plaintiff's attorney, in such case, shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and likewise give notice thereof to the defendant or defendants, by delivering an *English* notice, written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which notice shall be likewise expressed *the nature of the action*, and at *whose suit* prosecuted, and the *time limited* by the rules of this court, for such defendant or defendants *to plead* to such action;

action; and that in case, such defendant or defendants do not plead to such declaration by such *limited time*, so to be *expressed* in such notice, judgment will be entered against such defendant or defendants by default. And from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise. And in case such defendant or defendants (after such notice given) do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment, without any other or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants; or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants, of the time of executing such writ of inquiry. *R. T. 1 Geo. 2.*

Well delivered from the time notice.

If no plea, judgment may be signed, and notice of executing inquiry given.

It was held that delivery of a declaration before the end of the second term, by leaving it in the office, though *no notice* was given, was a good delivery to prevent a nonpros. *West v. Radford, 3 Burr. 1452. 2 Term Rep. 112.*

Filed before end of second term, good though no notice,

Of declaring de bene esse on Common Procefs.

It is ordered, that upon all procefs to be issued out of this court, returnable *before the last return of any term*, where *no affidavit* shall be made and filed of the cause of action, pursuant to the act of parliament for preventing vexatious arrests, the plaintiff may file or deliver the declaration *de bene esse*, at the return of such procefs, with notice to plead in *eight days* after the filing or delivery thereof; and if the defendant doth not file common bail, and plead within the said *eight days*, the plaintiff, having filed common bail for such defendant according to the said act, may sign judgment for want of a plea, provided that such declaration be *delivered or filed*, and notice thereof given *four days exclusive, before the end of such term*, and a rule to plead be duly entered. *Rule Trinity Term, 22 Geo. 3.*

Of delivering declaration *de bene esse*, where no affidavit filed, upon procefs returnable before the last return.

Before this rule was made, the plaintiff could only declare on writs returnable the *first or second return* only *de bene esse*; but the present rule extends such delivery to *all returns*, but the *last*; and on the *last* re-

turn,

turn, a declaration *de bene esse* cannot be delivered at all; for the defendant must be in court, either by his own appearance, or that of the plaintiff's for him, before the plaintiff can declare at all. Therefore no declaration can be delivered but in *chief*, in this case.

The like on Bailable Process.

Of delivering declaration *de bene esse* where an affidavit is filed.

Upon process to be issued and *made returnable* as *aforsaid*, where an affidavit shall be made and filed of the cause of action, pursuant to the said act, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead *in four days* after such filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant lives *within 20 miles of London*; and in *eight days* if the action is laid in any other county, or the defendant lives above 20 miles from *London*. And if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed; provided that such declaration be delivered or filed, and notice thereof given, *four days exclusive before the end of such term*, and a rule to plead be duly entered. *Rule Trinity Term, 22 Geo. 3.*

If bail be not justified, a declaration may be delivered the next term to plead without imparlance.

Writ returnable last day of *Trinity term*, on which day bail was put in, but did not justify till 9th *November* following, and no declaration being delivered *de bene esse* before the *essoign day* of *Michaelmas term*, motion for time to plead till the next term; *Court held*, that the defendant was not entitled to an imparlance, for the rule is, that no laches can be imputed to the plaintiff for not declaring until the defendant is perfectly in court, and refused the rule. *Rolleston v. Scott, 5 Term Rep. 372.* But this was not generally understood to be the practice, previous to this determination.

When defendant is entitled to an imparlance.

If the process be returnable on the last return of any term, and the defendant does not perfect his bail before the end of that term, the plaintiff may deliver a declaration *de bene esse* to plead in the first four days of the next term; but he is not bound so to declare, as appears by the above case of *Rolleston and Scott*. Generally if the process be returnable the last return day of the term, and the plaintiff deliver his declaration before the *essoign day* of the next term, in such case, the notice must be for defendant to plead within the first four days of

of the next term, he being in that case, entitled to an imparlance.

Of declaring by the by.

A declaration by the by pre-supposes a declaration in chief; therefore the plaintiff must declare in the original action, before he can declare by the by. *Delves qui tam v. Strange*, 6 Term Rep. 158.

A general rule for settling and declaring the practice of this court touching declaring by the by, in cases where the plaintiff, in any action or suit, hath filed, or shall file common bail for the defendant, pursuant to the late act of parliament, For preventing frivolous and vexatious arrests: "It is ordered, that in all such cases, the plaintiff in such action or suit, wherein common bail hath been or shall be so filed as aforesaid, may deliver a declaration by the by against such defendant, in like manner as might have been done by the antient course of this court. But that no other person except such plaintiff is or shall be capable of delivering a declaration by the by against any defendant, by reason of common bail being so filed by any plaintiff as aforesaid." And for the better distinguishing by whom common bail shall have been filed in any action or suit; *It is further ordered*, that from and after the last day of this term, in all cases where common bail shall be filed by the plaintiff or defendant by virtue of the said act, these words shall be written on the bail-piece, viz. *filed according to the statute*, or words to the like effect. R. M. 10 Geo. 2.

Declaring by the by.

When the defendant has filed common or special bail for himself, any person may deliver or file a declaration against him by the by, at any time during the term wherein the process against the defendant is returnable, *sedente curia*; and the practice hath been, that the plaintiff, at whose suit the process is, might declare against the defendant in as many actions as he thinks fit, before the end of the next term, after the return of the process. N. on the above rule.

If special or common bail be filed by defendant, any person may declare against him by the by.

Sulyard v. Harris.—This was a suit by bill, against Harris, by two persons named Sulyard; Harris was served with common process, not requiring bail; he appeared at the return of the process, and filed common bail. The next day, Edward Sulyard alone, one of the two plaintiffs, without his companion, delivered a declara-

If defendant file bail, any other plaintiff may declare by the by against him, within the term the writ is returnable.

a declaration by the by against the defendant, and the defendant obtained Mr. Justice *Yates's* order to stay proceedings, and upon motion to set aside the order, the rule was made absolute for discharging the judge's order. The practice reported by *Master Owens* is, *That where the proceeding is by bill, if a defendant is in court, either by being in actual custody of the marshal, or by a voluntary appearance at any plaintiff's suit, any other plaintiff is at liberty to deliver a declaration by the by against him, within the same term wherein the writ was returnable.* 4 *Burr.* 2180.

If after a plea in abatement the plaintiff enter a *cassetur billa* on the roll, he may during same term in which the writ is returnable deliver a declaration by the by.

To debt on a judgment, defendant pleaded in abatement she was executrix and not administratrix, on which plaintiff, 20th of *March*, entered on the roll *quod billa cassetur, et defendens eat sine die.* On 28th of *March* the same term, he delivered a declaration by the by, which defendant refused to accept, but it was left with him. Motion to set aside proceedings for irregularity. The court said, the proceedings were regular; that the defendant was in court during the whole term, and consequently that the plaintiff might deliver a declaration against him during the term, and discharged the rule. *Milles v. Andrews ad.* 5 *Term Rep.* 634.

Must declare in the original action before declaration by the by.

The plaintiff having sued out a writ *qui tam*, and declared in his own name only, the proceedings were set aside, and the court said, he must declare in the original action, before he can declare by the by, and he cannot convert one species of action into another, in the first instance. *Delves qui tam v. Strange*, 6 *Term Rep.* 158.

What is a waiver of bail.

The delivery or filing of a declaration before special bail is put in, is a waiver of the bail; unless the same is delivered or filed *de bene esse*; and if the bail have not justified, is an acceptance of them, unless delivered *de bene esse.* *N. on R. M.* 10 *Geo. 2. Reg. 2. (b).*

What discharges bail by original.

If an original be sued out in one county, and the declaration laid in another, though it be good against the defendant, yet the bail are discharged, and not liable to a *sci. fa.*; otherwise if by bill. 3 *Lew.* 235. 245. So if plaintiff declare contrary to the *ac etiam* in the writ. *Ibid.* *N. on R. E.* 2 *Geo. 2. (a).*

Within

Within what Time to declare.

The plaintiff must declare before the end of the term next after the return of the process, or the defendant may sign a *nonpros* (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual, 13 Car. 2. c. 2. s. 5. and no rule to declare need be given in this court, either by *bill* or *original*.

Within what time to declare.

Mr. Justice Buller. By the general rules of law, a plaintiff must declare against a defendant within *twelve months after the return of the writ*. But by the rules of the court, if he do not deliver his declaration within *two terms*, the defendant may sign judgment of *nonpros*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration within the year. 2 Term Rep. 112. *Orley v. Lee*. 3 Term Rep. 123. *Perry v. Harvey*.

I cannot find any *antient* authority for this determination, how is the defendant continued in court; if there are rules to declare it would be so; but there can be no day given to continue the parties in court without leave. And the rule *Mi.* 1654, *sect.* 14. says, if plaintiff do not the *second term* declare, a *non-suit* may be entered upon a continuance over by him, by *dies datus*, but not the *third term* or after. Vide *Co. Lit.* 134. *Gilb. C. P.* 40. And the common pleas only allow till the *essoign* of the *third term* to declare, if *nonpros* be not signed previous on a rule given.

Har. Prac. 307.
Rich. P. 201.
12 Mod. 217.
Express.

The defendant cannot sign a *nonpros* unless he enter his appearance *within the term the writ is returnable*. *Caf. temp. Hard.* 138. 2 Term Rep. 719.

Nonpros.

Of obtaining Time to declare.

To prevent a *nonpros* being signed, the plaintiff may get a *fide-bar* rule from the clerk of the rules, if the defendant is not in custody, the last day of the second term, for time to declare until the first day of the next term, for which pay 4s. 6d. serve defendant's attorney with a copy, or stick a copy up in the office if he does not appear: And he may have as many rules as he likes from term to term, but there must be two in a term, *viz.* one from the first day of the term, to the last day, and the other from the last day, to the first day of the next term. But the defendant may, if he thinks proper,

Time to declare may be obtained.

DELIVERY of DECLARATION.

proper, move the court, *that the last rule may be pre-emptory*, which is done by giving counsel instructions, on a brief for that purpose, with 10s. 6d. annexing an office-copy of the last rule to declare; draw up rule at the clerk of the rules, serve copy on plaintiff's attorney. *N. B.* The rule is pre-emptory in the first instance.

This rule cannot be had where the defendant is a prisoner. But if the writ be against *two* others as well as the prisoner, and the *two* cannot be found, the court will grant rules for time to declare against the prisoner, until the other *two* be outlawed. 2 *Crompt. 9. Tidd, 223.*

N. B. The clerk of the rules will make this rule special on being spoke to.

Notice of Declaration.

Of the notice.

In all notices, care is to be taken that the *cause be properly named*, as well as the court in which the suit is instituted; and in notices of declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead to such declaration. *R. T. 1 Geo. 2.* directed to the defendant.

John Denn, plaintiff,
and

In the King's Bench.

Richard Fenn, defendant.

Notice of declaration *de bene esse*, where the action is bailable.

Take notice, that a declaration was this day filed with the clerk of the declarations in the King's Bench office in the *Inner Temple, London*, conditionally (until special bail is put in and perfected), as of this present *Easter* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 20l. and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default. Dated this 13th day of *April 1796*.

If in the country, eight days.

Yours, &c.

R. S. attorney for plaintiff.

To Mr. *Richard Fenn*, the above-named defendant.

The like upon common process.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, conditionally (until common bail is filed), as of this present *Easter* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 10l. and unless you appear and plead thereto, in eight days from the date

NOTICE of DECLARATION.

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date hereof, judgment will be signed against you by default. Dated this 13th day of April 1796.

Yours, &c. R. S. att. for plaintiff.
To Mr. C. D. the above defendant.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the King's Bench office, in the *Inner Temple, London*, as of this present *Easter* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 10l. and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default. Dated this 22d day of April 1796.

The like upon common process, where bail or appearance is filed according to the statute.

If in the country, eight days.

Yours, &c.

J. S. attorney for plaintiff.

To Mr. C. D. the above defendant.

This notice will do where bail is perfected: or for a declaration filed by the by, only say "*filed by the by.*"

If the declaration be delivered of *Trinity*, to plead in *Michaelmas*, then say, unless you plead thereto within the first four days of next *Michaelmas* term, judgment will be signed against you by default.

If filed of another term.

Of intitling and laying the Day in Declaration.

It is usual, when the cause of action will admit of it, to intitle the declaration *generally* of the *term* in *which the writ is returnable*; but it should always be intitled *after* the time when the cause of action is stated to have accrued: therefore, where the cause of action is stated to have accrued *after* the *first* day of the *term* in which the *writ is returnable*, the declaration should be intitled of a *subsequent* day in that *term*, and not of the *term generally*; for a *general* title refers to the *first* day of the *term*; upon such a title it would appear, that the action was commenced *before* the *cause* of it *accrued*. Yet where the cause of action was stated to have accrued on the *first* day of *term*, the court on demurrer held, that the declaration might be intitled of the *term generally*, for the delivery of the declaration is the act of the party; and in antient times, when the practice was to declare *ore tenus*, it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued, before the actual delivery of

the declaration. *Pugh v. Robinson*, 1 Term Rep. 116. Vide 2 Lev. 176. Where a declaration is improperly intitled, the plaintiff may have it corrected, on an affidavit of the fact. *Symonds v. Parminter and another*, 1 Wils. Rep. 78.

Or it may be set right at the instance of the defendant: Thus, where the declaration is intitled of the term generally, and the defendant pleads *plene administravit*, or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill relates, and the day of suing out the writ; he has a right to call upon the plaintiff, to intitle his declaration properly, *Caf. temp. Hard.* 141. or to make up the paper book, with a memorandum according to the truth of the fact. *Smith v. Key*, 1 Str. 638. In *Smith v. Raydon*, M. 12 Geo. 1. the court ordered a special memorandum to be made, in order to give the party leave to plead a tender. Cited in 1 Wils. 39.

Per curiam—The defendant has a right to call upon the plaintiff to intitle his declaration agreeable to the true time of delivering it to the defendant: *Thompson v. Marshall*, 1 Wils. 304.

The court held that a declaration ought to be intitled of the term in which the writ is returnable, (for it is to be considered as delivered *nunc pro tunc*); and if not, to prevent the plaintiff's further claim, the defendant may have a judge's order for that purpose. And where a writ was served, returnable in Michaelmas term 1788, the declaration was not delivered till Hilary; and including a debt due to the plaintiff from Michaelmas to Hilary, it was held, he could not recover that debt, for he ought to have intitled his declaration of the term in which the writ was returnable. *Smith v. Mullen*, 3 Term Rep. 624.

If the cause of action arises within the term the declaration is of, then do not intitle it as of the term generally, but make a special day after the cause of action accrued, as, "Thursday next after the morrow of All Souls, in Michaelmas term, in the 36th year of the reign of king Geo. 3." instead of "Michaelmas term generally."

If the plaintiff declares on a note, the day is material, and an essential part of the agreement, from which he cannot

Ought to be intitled the term in which writ is returnable.

In what actions the day is material.

cannot vary; so on a *bond* or other writing; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the declaration. *Ibid.* Str. 21. *Vide Co. Lit.* 283. *Plow. Com.* 24. a.

In other cases, as in trespass, assault, battery, &c. the day is *immaterial*, but is in general laid after the cause of action accrued, and before the term or time of which the declaration is intitled. When not;

In assault and battery, proof that the assault was on a day after the commencement of the suit, may be helped. 1 *Wils.* 171. *Hay v. Kitchin.*

In trover a demand and refusal appeared to be *subsequent* to the bringing of the action, for it appeared on the *nisi prius* roll, that the *bill* was filed of *Easter term*; and consequently as there was no special memorandum, it must refer to the first day of that term, which was in the beginning of *April*, long before the time of the demand and refusal on 2d of *May*. The plaintiff produced the writ, which appeared to be sued out after the 2d of *May*. Verdict for the plaintiff; and the point reserved was, whether the writ was admissible. The court were of opinion that the writ was rightly admitted; and *Lord Mansfield* said, If there be no special memorandum, the bill by fiction of law relates to the first day of the term. But fictions of law hold only in respect of the *ends and purposes for which they were invented*; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth. The bill is not the commencement of the suit; the writ is: and being after the time to which the bill relates, shews there should have been a special memorandum. *Morris v. Pugh*, 3 *Burr.* 1243. Trover.

It has been determined, in actions upon *penal* statutes, which must be brought within a limited time, that the plaintiff may shew the true commencement of the prosecution contrary to the fiction. *Ibid.*

If a bill be filed against an attorney in *vacation*, the day of filing it may be inserted in a special memorandum if the cause of action accrued in vacation. *Vide Proceedings against Attornies.* 5 *Term Rep.* 325. *Dodsworth v. Bowen.*

For more on this head, see my *Modern Pleader*, p. 56.

Declarations in Assumpsit.

DECLARATIONS in *assumpsit* in common use, those by and against executors, administrators, assignees of bankrupt, &c. as also on promissory notes, are to be met with in my Modern Pleader, a book calculated for the office of an attorney, with useful notes, and the evidence to support each declaration.

Prayer against
the acceptor on
a bill of ex-
change, by
original.

London, (ss.) T. C. late of *London*, merchant, was attached to answer *J. P.* in a plea of trespass on the case, &c. and whereupon the said *J. P.* by *A. D.* his attorney, complains, *For that whereas*, one *T. C.* on the 29th day of *September*, in the year of our Lord 1705, to wit, at *London* aforesaid, in the parish of *Saint Mary-le-Bow*, in the ward of *Cheap*, according to the usage and custom of merchants from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there directed the said bill to the said *T. C.* by the name and addition of Mr. *T. C.* merchant, in *Milk-street, London*, and thereby required the said *T. C.* three months after the date of the said bill, to pay to the said *J. P.* or order, 80*l.* for value received; and then and there delivered the said bill of exchange to the said *J. P.*; which said bill of exchange the said *T. C.* afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants, and by reason thereof, and according to the said usage and custom of merchants, the said *T. C.* became liable to pay to the said *J. P.* the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof, and being so liable, he the said *T. C.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said *J. P.* to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his acceptance thereof. *And whereas* the said *T. C.* afterwards, to wit, on, &c. at, &c.

Add

Add a count for money had and received, and common conclusion, but no pledges.

Declarations in Debt.

London, (js.) *A. B.* complains of *C. D.* being in the custody of the marshal, &c. of a plea, that he render to him, the said *A. B.* 800*l.* of lawful money of Great Britain, which he owes to, and unjustly detains from him; and whereupon the said *A. B.* by *E. F.* his attorney, complains, *For that whereas* the said *C. D.* on the 20th day of April, in the year of our Lord 1790, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, by his certain writing obligatory, sealed with the seal of the said *C. D.* and now shewn to his majesty's court here, the date whereof is on the day and year aforesaid, acknowledged himself to be then and there held and firmly bound unto the said *A. B.* in the sum of 800*l.* to be paid to the said *A. B.* when he should be thereto afterwards requested. Yet the said *C. D.* (although often requested, &c.) hath not yet paid the said sum of 800*l.* above demanded, or any part thereof, to the said *A. B.* but to pay the same, or any part thereof, to the said *A. B.* he the said *C. D.* hath hitherto wholly refused, and still doth refuse to the said *A. B.* his damage of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

On bond,
obligee against
obligor by bill.

The exact date
of the bond.

Middlesex, to wit, *S. F.* late of, &c. was summoned to answer *R. T.* and *J. A.* assignees of the estate and effects of *J. M.* a bankrupt, according to the force, form, and effect of the several statutes made concerning bankrupts, of a plea, that he render to them the sum of 1420*l.* of good and lawful money of Great Britain, which he owes to, and unjustly detains from them, &c. and whereupon the said *R. T.* and *J. A.* by *J. B.* their attorney, complain, *That whereas* the said *S. F.* before the said *J. M.* became a bankrupt, to wit, on the 8th day of January, in the year of our Lord 1791, at Westminster, in the said county, by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to the said *J. M.* in the sum of 1420*l.* of good and lawful money of Great Britain, to be paid to the said *J. M.*

Declaration on
bond at the suit
of assignees of
bankrupt, by
original.

Conclusion.

or his assigns, when he the said *S. F.* should be thereunto afterwards requested; Yet the said *S. F.* (although often requested, &c.) hath not paid the said sum of 1420*l.* above demanded, or any part thereof, to the said *J. M.* before he became a bankrupt, or to the said *R. T.* and *J. A.* assignees as aforesaid, since the said *J. M.* became a bankrupt, or to either of them, but he to pay the same, or any part thereof, to them or either of them, hath hitherto wholly refused, and still doth refuse; wherefore the said *R. T.* and *J. A.* assignees as aforesaid, say, they are injured, and have sustained damage to the value of 10*l.* and therefore they bring their suit, &c. And the said *R. T.* and *J. A.* assignees as aforesaid, now bring here into court the said writing obligatory, sealed with the seal of the said *S. F.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the same day and year in that behalf above-mentioned, &c.^a

Proferit in curia.

The like ats of
executors, by
bill,

*London, (ss.) C. P. and R. S. executors of the last will and testament of P. P. Esquire, deceased, complain of J. T. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to them 2400*l.* of lawful money of Great Britain, which he unjustly detains from them; For that whereas the said J. T. on the 25th day of March, in the year of our Lord 1791, at London aforesaid, to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, by his certain writing obligatory; sealed with the seal of the said J. T. and now shewn to his Majesty's court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to the said P. P. in his life-time, in the said sum of 2400*l.* above demanded, to be paid to the said P. P. his executors, administrators, or assigns, when he the said J. T. should be thereto afterwards requested; nevertheless the said J. T. (although often requested, &c.) hath not paid the said sum of 2400*l.* or any part thereof, to the said P. P. in his life-time, or to the said C. P. and R. S. executors as aforesaid, since the decease of the said P. P. but to pay the same, or any part thereof, to the said P. P. in his life-time, or to the said C. P. and*

^a For useful notes in action of debt, see my *Med. Plead.* p. 70 to 73; by and against executors and administrators, 106 to 121.

R. S.

R. S. executors as aforesaid, since the decease of the said *P. P.* he the said *J. T.* hath hitherto wholly refused, and still doth refuse, To the said *C. P.* and *R. S.* executors as aforesaid, their damage of 30*l.* and therefore they bring suit, &c. And they bring into court here the letters testamentary of the said *P. P.* by which it sufficiently appears to the court here, that the said *C. P.* and *R. S.* are the executors of the last will and testament of the said *P. P.* deceased; and have the administration thereof, &c. Pledges, &c.

Prof. in cur.
of probate.

Middlesex, to wit, *J. B.* and *G. B.* complain of *R. P.* being in the custody of, &c. of a plea, that he render to the said *J.* and *G.* 203*l.* 3*s.* of lawful money of Great Britain, which he owes to, and unjustly detains from them: For that whereas they the said *J.* and *G.* heretofore, (that is to say) in Michaelmas term, in the 35th year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being held at Westminster, in the county of Middlesex), by the consideration and judgment of the same court, recovered against the said *R.* a certain debt of 200*l.* and 63*s.* which were then and there in and by the said court adjudged to the said *J.* and *G.* for their damages which they had sustained, as well by occasion of the detaining of that debt, as for their costs and charges by them laid out about their suit in that behalf, whereof the said *R.* is convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; which said judgment still remains in the said court, in its full force, strength, and effect, and not in the least reversed, annulled, set aside, paid off, satisfied, or discharged; and the said *J.* and *G.* have not, nor hath either of them yet obtained execution of their said judgment, whereby an action hath accrued to the said *J.* and *G.* to demand and have of the said *R.* the said 203*l.* 3*s.* above demanded; yet the said *R.* (although often requested, &c.) hath not yet paid the said 203*l.* 3*s.* or any part thereof, to the said *J.* and *G.* or to either of them, but he to do this hath hitherto wholly refused, and still refuses, to the said *J.* and *G.* their damage of 10*l.* and therefore they bring their suit, &c. Pledges, &c.

Declaration on a judgment recovered by the plaintiffs in *K. B.* in debt.

The term of which the judgment was signed.

If in assumpsit, say, For 40*l.* for their damages which they had sustained, as well by means of the non-performance of certain promises, &c.

Declaration on a
non pros for the
defendant for
not declaring.

Middlesex, (ss.) Richard Fenn complains of John Denn, being, &c. of a plea, that he render to him 10l. of lawful money of Great Britain, which he owes to, and unjustly detains from him: For that whereas the said Richard, heretofore, to wit, in Hilary Term, in the 35th year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being held at Westminster, in the county of Middlesex), by the consideration and judgment of that court, recovered against the said John 33s. and 6d. which in the said court of our said lord the king, before the king himself, at Westminster aforesaid, were adjudged to the said Richard, according to the form of the statute in such case made and provided, for his costs and charges laid out by him about his defence of and in a certain plea then lately commenced by the said John against the said Richard in the same court, for that the said John had not prosecuted the said plea; whereof the said John was convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; which said judgment still remains in its full force, strength, and effect, not in the least reversed, annulled, set aside, paid off, or satisfied, and the said Richard hath not obtained any execution of the said judgment, whereby an action hath accrued to the said Richard, to demand and have of the said John the said 33s. and 6d. parcel of the said 10l. above demanded: And whereas the said John, afterwards, to wit, on the first day of April in the year of our Lord 1795, at, &c. borrowed of the said Richard 8l. 6s. 6d. of like lawful money, residue of the said 10l. to be paid to the said Richard, when he the said John should be thereto afterwards requested, yet the said John (although often requested, &c.) hath not yet paid the said 10l. or any part thereof, to the said Richard, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the said Richard his damage of 10l. and therefore he brings his suit, &c. Pledges, &c.

Declaration by
the assignee of
the sheriff on a
bail-bond against

London, (ss.) Timothy Walker, assignee of Richard Glode, Esquire^a, and John Liptrap, Esquire, sheriffs

^a On inquiry I find Sheriff Glode is knighted, therefore say, Sir Richard Glode, Knight,

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of the city of *London*, according to the form of the statute in such case made and provided, complains of *William Benson*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea that he render to the said *Timothy*, assignee as aforesaid, 30*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him: *For that whereas* he the said *Timothy*, on the 21st day of *March*, in the 36th year of the reign of our sovereign lord *George* the third, now king of *Great Britain*, &c. sued and prosecuted, out of the court of our lord the king, before the king himself, the same court then and still being held at *Westminster*, in the county of *Middlesex*, against the said *William*, a certain^a writ of our said lord the king called a *latitat*, directed to the said sheriffs of *London*^b, by which said writ, our said lord the king commanded the said *sheriffs*^c, that they should take the said *William*, if he should be found in their bailiwick, and keep him safely, so that they might have his body before the lord the king at *Westminster*, on *Wednesday* next after 15 days of *Easter* then next following, to answer the said *Timothy* in a plea of trespass, and also to a bill of the said *Timothy*, to be exhibited against the said *William* for 30*l.* on promises, according to the custom of his majesty's court, before his majesty, and that the said *sheriffs* should then have there that writ^d, which said writ, afterwards, and before the delivery thereof to the said *sheriffs*, to be executed as is hereafter mentioned, was duly marked or indorsed for bail for 15*l.* by virtue of an affidavit of the cause of action, before then made and duly assised of record in the said court of our said lord the king, before the king himself, according to the form of the statute in such case made and provided, and which said writ so indorsed, afterwards, and before the return thereof, to wit, on the 2d day of *April*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said *Richard Glode* and *John Liptrap*, then *sheriffs of the said city of London*; in due form of law to be executed; by virtue of which said writ, the said *Richard Glode* and *John Liptrap*, then being sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the

principal. This form will do for one in *Middlesex*, as altered in the margin, and say *sheriff* instead of *sheriffs*, *precept* instead of *writ*.

^a A certain precept of our lord the king called a bill of *Middlesex*.

^b Whereby the sheriff was commanded.

^c Sheriff.

Sheriff.

Sheriff.

The date of the bond.

Sheriff of the county of *Middlesex*.

^d The issuing of the process is traversable; if no writ issued, the bond is void. *Say. 116.* But the arrest is not traversable. *Str. 444. 643.*

day

Sheriff,

Date of bond,

County of Middlesex.
Sheriff of the
county of Middlesex,

Set forth the
condition,

day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, did take and arrest the said *William* by his body, and then and there had and detained him in their custody, at the suit of the said *Timothy* for the cause aforesaid; and the said *William* being so arrested, and in custody of the said sheriffs as aforesaid, at the suit of the said *Timothy*, by virtue of the said writ, the said *Richard Glode* and *John Liptrap*, being sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in, &c. and within their bailiwick, took bail for the appearance of the said *William* at the return of the said writ; and on that occasion, the said *William* then and there, to wit, on the said 2d day of *April*, in the year aforesaid, at *London* aforesaid, in, &c. by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the said *William*, and now shewn to the court of our said lord the king, before the king himself, the date whereof is the day and year last aforesaid, acknowledged himself to be held and firmly bound to the said *Richard Glode* and *John Liptrap*, then being sheriffs of the said city of *London*, as aforesaid, in the sum of 30*l.* of lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said *William* should be thereto afterwards requested, with and under a certain condition subscribed to the said writing obligatory, that if the said *William* did appear before the lord the king, at *Westminster*, on *Wednesday* next after 15 days of *Easter*, to answer to the said *Timothy* in a plea of trespass, and also to a bill of the said *Timothy*, to be exhibited against the said *William*, for 30*l.* on promises, according to the custom of his majesty's court, before his majesty, then that obligation to be void, otherwise to be and remain in full force and virtue, as by the said writing obligatory, and the condition thereof (relation being thereto had), may more fully and at large appear; and the said *Timothy* in fact saith, that the said *William* did not appear before the lord the king, at *Westminster*, on *Wednesday* next after 15 days of *Easter*, in the condition of the said writing obligatory mentioned, according to the form and effect of the said condition, but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the said *Timothy* further

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further faith, that the said writing obligatory being so forfeited, and the money therein specified, or any part thereof, not being paid or satisfied to the said *sheriffs*, the said *Richard Glode* and *John Liptrap*, being then *sheriffs of the city of London* as aforesaid, afterwards, to wit, on the 18th day of *April*, in the year aforesaid, to wit, at *London* aforesaid, in, &c. at the request, costs, and charges of the said *Timothy*, the plaintiff in that suit, by an indorsement on the back of the said writing obligatory, then and there made and attested in the presence of two credible witnesses, and sealed with their seal of office of *sheriffs* of the said city of *London*, assigned the said writing obligatory to the said *Timothy*, according to the form of the statute in that case made and provided, as by the assignment indorsed on the said writing obligatory as aforesaid, and duly stamped before the commencement of this suit, according to the form of the statute last aforesaid, and to the court of our said lord the king, before the king himself, now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said *Timothy*, as assignee of the said *sheriffs*, to demand and have of and from the said *William* the said 30*l.* above demanded; yet the said *William* (although often requested, &c.) hath not as yet paid the said 30*l.* above demanded, or any part thereof, to the said *Timothy*, assignee as aforesaid, but he so to do hath hitherto wholly refused, and still refuses, to the said *Timothy*, assignee as aforesaid, his damage of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

Sheriff.

Sheriff of the
county of Mid-
dlesex.Date of assign-
ment.

Sheriff.

Sheriff.

London, (s.) *Richard Fenn*, assignee of *Richard Glode* Esquire, and *John Liptrap*, Esquire, sheriffs of the city of *London*, according to the form of the statute in such case made and provided, complains of *William Doe*, being, &c. of a plea, that he render to the said *Richard*, assignee as aforesaid, 600*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; For that whereas the said *Richard* heretofore, to wit, on the 5th day of *March*, in the year of our Lord 1796, sued and prosecuted out of the court of our said lord the king, before the king himself (the said court then and still being held at *Westminster*, in the county of *Middlesex*), a certain writ of our lord the king, called a special *capias ad respondendum*, directed to the

Declaration up-
on a bail-bond,
against one of
the bail, where
the bond was
taken on a spe-
cial *capias*, by
original.

sheriffs of *London*, by which said writ, the said sheriffs were commanded to take one *John Denn*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before his majesty in 15 days of *Easter* wheresoever his said majesty should then be in *England*, to answer the said *Richard* in a plea of trespass on the case upon promises, to the said *Richard* his damage of 600*l.* and that the said sheriffs should have there that writ; which said writ, afterwards and before the delivery thereof to the said sheriffs for execution, as hereafter is mentioned, was duly marked or indorsed for bail for 300*l.* by virtue of an affidavit before then made and duly assiled of record, in the said court of our said lord the king, before the king himself, of the cause of action of the said *Richard* in that behalf, according to the form of the statute in that case made and provided; and which said writ so indorsed, afterwards, and before the return thereof, to wit, on the first day of *April*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said *Richard Glode* and *John Liptrap*, then being sheriffs of the said city of *London*, to be executed in due form of law; by virtue of which said writ, the said *Richard Glode* and *John Liptrap*, sheriffs as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took and arrested the said *John Denn*, by his body, and then and there had and detained him in their custody, at the suit of the said *Richard*, for the cause aforesaid; and the said *John Denn* being so arrested, and in custody of the said sheriffs, afterwards, and before the return of the said writ, to wit, on the same day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took bail for the appearance of the said *John Denn* at the return of the said writ, according to the form of the statute in such case made and provided, and on that occasion the said *William Doe*, as bail or surety of the said *John*, then and there, to wit, on the said first day of *April*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with his seal, and now shewn to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be

Date of bond.

keld

held and firmly bound to the said *Richard Glode* and *John Liptrap*, sheriffs of the said city of *London*, in the sum of six hundred pounds of good and lawful money of *Great Britain*, to be paid to the said *Richard Glode* and *John Liptrap*, or their certain attorney, executors, administrators, or assigns, when he the said *William* should be thereunto required, with a condition to the said writing obligatory underwritten, that if the said *John* should appear before the lord the king in 15 days of *Easter*, wheresoever, &c. to answer to the said *Richard* in a plea of trespass on the case upon promises, to the said *Richard* his damage of 600*l.* then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigor, and effect, as by the said writing obligatory, and the condition thereof, (relation being thereunto had,) will more fully appear; and the said *Richard* in fact saith, that the said *John* did not appear before his majesty in 15 days of *Easter*, wheresoever, &c. in the condition aforesaid mentioned, according to the form and effect of the said condition, whereby the said writing obligatory became forfeited; and the said writing obligatory being so forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said sheriffs, the said *Richard Glode* and *John Liptrap*, then and now being sheriffs of the said city of *London*, afterwards, to wit, on the 18th day of *April*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, costs, and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, then and there made and attested in the presence of two credible witnesses, sealed with their seal of office of sheriffs of the said city of *London*, assigned the said writing obligatory to the said *Richard*, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that case made and provided, and to the court of our said lord the king now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and by force of the statute in that case made and provided, an action hath accrued to the said *Richard*,

as assignee of the said sheriffs as aforesaid, to demand and have of the said *William* the said sum of 600*l.* above demanded: *Nevertheless*, the said *William* (although often required) hath not yet paid the 600*l.* above demanded, or any part thereof, to the said *Richard*, assignee as aforesaid; but he to pay the same, or any part thereof, to the said *Richard*, hath hitherto wholly refused, and still refuses, to the said *Richard* his damage of 20*l.* and therefore he brings his suit, &c. Pledges, &c.

If by the late
sheriffs.

If the bond be assigned by the *late sheriffs* (add those words), and that they assigned the same to the plaintiff; and instead of the words *now being sheriffs*, say (*then being sheriffs*); the *venue* may be laid in *London* or *Middlesex*, although the arrest and assignment were made in any other county. 2 *Lord Raym.* 1455. 2 *Str.* 727.

Declaration for
a common as-
sault.

Oxfordshire, (fs.) R. B. complains of *J. B.* being in, &c. *For that* the said *J. B.* on the 5th day of *August*, in the year of our Lord 1795, to wit, at *Burford*, in the said county, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said *R.* and then and there beat, bruised, wounded, and ill-treated the said *R.* insomuch that his life was then and there thereby greatly despaired of, and other wrongs to him the said *R. B.* then and there did, against the peace of our lord the now king, and to the said *R.* his damage of 100*l.* and therefore he brings his suit, &c. Pledges, &c.

For an assault
and imprison-
ment.

London (fs.) R. B. complains of *J. B.* being, &c. *For that* the said *J.* on the 1st day of *November*, in the year of our Lord 1795, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said *R.* to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, and then and there beat, bruised, wounded, and ill-treated her, and then and there imprisoned her, and kept and detained her in prison for a long time, to wit, for the space of ten days then next following, until she was forced and obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, the sum of 40*l.* in the obtaining of her discharge from such her imprisonment, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said *R. B.*

And

And also for that the said *J. B.* on, &c. (add another count for a common assault), and then and there did other wrongs to the said *R.* against the peace of our lord the now king, and to the said *R.* her damage of 100*l.* and therefore she brings her suit, &c. Add pledges, &c.

London, (js.) A. B. complains of *C. D.* being in the custody of the marshal of the *Marshalsea*, &c. For that the said *C.* on the — day of —, in the year of our Lord 1795, with force and arms, to wit, with sticks, staves, clubs, and fists, made an assault upon the said *A.* at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, and greatly bruised, wounded, and ill-treated him, so that his life was thereby then and there greatly despaired of, and then and there threw, cast, and tossed, a lighted squib, consisting of gunpowder and other combustible materials, at and against the said *A.* and struck the said *A.* on the face therewith, and so greatly burnt one of the eyes of the said *A.* that the said *A.* underwent and suffered great and excruciating pain and torment for a long time, to wit, for the space of six months then next following, and afterwards wholly lost his said eye; and the said *A.* hath not only been forced to lay out and expend a large sum of money, to wit, the sum of 20*l.* in and about the said wound, but has also been prevented and hindered from following and transacting his lawful affairs and business, and is wholly deprived of the use and benefit of his said eye, and the sight thereof: And also for that the said *C.* on the day and year aforesaid, at *London* aforesaid, in, &c. made another assault on the said *A.* and threw, cast, and tossed a certain lighted fire-work, consisting of gunpowder, at and against the said *A.* and struck the said *A.* on the face therewith, and so greatly burnt one other eye of the said *A.* that the said *A.* for a long time, to wit, for the space of six months then next following, underwent and suffered great and excruciating pain and torture, and afterwards wholly lost his said eye; and the said *A.* hath not only been forced to lay out, &c. (as in the first count). Add a count for a common assault to the said *A.* his damage of 500*l.* and therefore he brings his suit, &c. Add pledges.

For an assault, and putting out of plaintiff's eye with a lighted squib.

London, (js.) J. R. complains of *T. K.* being in the custody, &c. of a plea of trespass on the case. For that

Declaration in trover for plate.

The day is not material.

that whereas the said *T. K.* on the 2d day of *November*, in the year of our Lord 1795, at *London* aforesaid, in, &c. was possessed of certain plate, to wit, one silver tankard, and one pint silver mug of the value of 10*l.* of lawful money of *Great Britain*, as of his own proper goods and chattels; and being so thereof possessed, he the said *T. K.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. casually lost the said goods and chattels, out of his hands and possession, which said goods and chattels, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. came to the hands and possession of the said *T. K.* who found the same; yet the said *T. K.* knowing the said goods and chattels to be the goods and chattels of the said *J. R.* and of right to belong and appertain to the said *J. R.* but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *J. R.* in this respect, hath not as yet delivered the said goods and chattels, or any part thereof, to the said *J. R.* (although often requested so to do), but he the said *T. K.* afterwards, to wit, on the 3d day of *November*, in the year aforesaid, at *London* aforesaid, in, &c. converted and disposed of the said goods and chattels to his own use; to the said *J. R.* his damage of 20*l.* and therefore he brings his suit, &c. Pledges, &c.

If the action is brought for *money*, add *money, goods, and chattels.*

Declaration in trespass, breaking and entering the close, eating up, and treading down corn with cattle, &c.

Oxfordshire, (fs.) J. W. complains of *R. A.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, *for that* the said *R.* on the 10th day of *October*, in the year of our Lord 1795, with force and arms, &c. broke and entered a certain close called *Rye Close*, of the said *J.* situate and being at *Witney*, in the said county, and there with his feet in walking, trod down, trampled upon, consumed, and spoiled the grass and corn, to wit, wheat, rye, barley, peas, beans, and oats of the said *J.* of the value of 10*l.* there then growing, and then and there with cattle, to wit, horses, mares, bulls, oxen, cows, and sheep, trampled upon, rooted up, consumed, and spoiled other the grass and corn, to wit, other wheat, rye, barley, peas, beans, and oats of the said *J.* of the value of other 10*l.* there then also growing, and other wrongs to the said *J.* then and there

there did, against the peace of our lord the now king, and to the said *J.* his damage of 20*l.* and therefore he brings his suit, &c. Add pledges.

London, (Jf.) W. C. complains of *R. G.* being, &c. Declaration in trespass for breaking and entering his house, &c.
For that the said *R. G.* on the 20th day of *September*, in the year of our Lord 1790, with force and arms, broke and entered the dwelling house of the said *W.* situate, standing, and being at the parish of *St. Andrew, Holborn*, in *London* aforesaid, and stayed and continued therein for a long time, to wit, for the space of six hours, and during the whole time, made a great noise, disturbance, and affray therein, and wrenched and forced open, or caused to be wrenched and forced open the closet doors, drawers, chests, cupboards, and cabinets of the said *W.* and the goods, chattels, wares, and merchandizes of the said *W.* of the value of 500*l.* then and there found, tossed, tumbled, damaged, and spoiled, and then and there did other wrongs to the said *W.* against the peace of his present majesty, and to the damage of the said *W.* of 100*l.* and therefore he brings his suit, &c. Pledges, &c.

The breaking and entering the plaintiff's house is the principal ground of this declaration; and all the rest are not foundations of the action, but matters only thrown in, to aggravate the damages. 2 *Salk.* 642, 643.

Venue.

VENUE (*vicinetum* or *visnetum*) is the place from whence a jury are to come to the trial of causes, which is generally some neighbouring place, *Locus quem vicini habitant*, from whence it is called *vicinetum* or *venue*. Venue.

It is absolutely necessary that there should be some county where the action is brought in particular, that there may be a *process* to the sheriff of that county, to bring a jury from thence to try it. *Cow.* 176. This county, which is laid in the declaration, is called the *venue*. Necessary some county should be named.

The general rule of law, as laid down by Lord Coke, is, That every trial shall be out of that town, parish, or hamlet, or place known, out of the town, &c. within which the matter of fact issuable is alledged, that is most certain General rule of law respecting the venue.

and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact. *Co. Litt.* 125. a.

Many niceties
got over.

Many niceties which were formerly to be observed with respect to laying the *venue*, are now removed by the 4 & 5 *Ann. c.* 16. which enacts, "That every venire facias, for the trial of any issue, shall be awarded of the body of the proper county where such issue is triable."

After *verdict*, no judgment shall be staid, for that there is no proper county or place where the action is laid. 16 & 17 *Car. 2. c.* 8. Vide 4 & 5 *Ann. c.* 16.

By *stat.* 24 *Geo. 2. c.* 18. Every *ven. fac.* for the trial of any issue in any action or information upon any penal statute in any of his majesty's courts of record at *Westminster*, in the counties palatine of *Lancaster*, *Chester*, and *Durham*, and the principality of *Wales*, shall be awarded of the body of the proper county where such issue is triable. *f.* 2.

Real actions to
be laid in the
proper county.

All actions, real or mixed, as trespass, *quare clausum fregit*, *ejectment*, *waste*, &c. must be laid in the county where the lands lie. *Bract.* 189. 414. So debt for rent, against an assignee of a term, on the privity of estate, is local, and will lie no where but in that county where the lands are. *Cro. Car.* 183. 1 *Wils.* 165. *Latch.* 187. *W. Jon.* 43. Debt upon estate is also local. 2 *Lill. Ab.* 782.

Venue by bill is
local or transitory.

The venue by bill is *local* or *transitory*; *local* when the action could only have arisen in a particular county, and there the venue must be laid, or the defendant may demur to the declaration, 1 *Wils.* 165. *Thrale v. Cornwall*; or the plaintiff on the general issue will be nonsuited at the trial. *Cow. Rep.* 410. But where the action might have arisen in any county, it is *transitory*, and the plaintiff may in general lay the venue wherever he pleases; subject to its being changed by the court, if not laid in the very county where the action arose.

If action arises
in any county.

The loss of bail.

The venue by *original* must be laid in the county where the *original* is issued, and where the action is intended to be tried, otherwise the plaintiff will lose his bail.

Personal actions
are local.

On all personal actions, as debt, detinue, assault, deceit, trover, and conversion, account, slander, and the like, the plaintiff may declare in what county he pleases. *Co. Litt.* 282. So against a sheriff for a false return. 1 *Wils.* 136. If a personal action be founded

founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged at such a place, in such a county: as if debt be upon a bond or bill made at *Hamburgh*, it may be alledged at *H.* viz. at *Islington in the county of Middlesex.* *Latch.* 5. *Salk.* 660. 659. *Lutw.* 950. 2 *Cro.* 76.

When an action is for a *transitory thing*, it may be brought in any county, as if it be upon a *covenant* or *contract*, or *debt* at large; for *debitum ex contractus sunt nullius loci.* 7 *Co.* 3. a. 2 *Inst.* 229. 231.

When an action is founded upon *two things* in different counties, both material to the maintenance of the action, it may be brought in the one county or the other. 7 *Co.* 2. a. *Dy.* 38. b. 40. a. *Salk.* 669. As if an arrest be in one county, and an escape in another.

1 *Lev.* 114. So in an action for a false return of *non est inventus*, where the sheriff was in company of the party. 2 *Mod.* 23. So if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county or the other. 7 *Co.* 1. b. As if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county or the other. 7 *Co.* 1. b. So for maliciously suing an execution in *Middlesex*, whereby he was arrested in *Dorsetshire.* *Cro. Eliz.* 574. So if an action on the case be against the sheriff of *Denbighshire*, for not arresting a man upon a *capias utlagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it may be in *Denbighshire* or in *Middlesex*, where the return was made. *Hob.* 209.

If there be matter of *law* or *record*, and matter in *pais* in different counties, plaintiff has his election. *Griffiths v. Walker*, 1 *Wils.* 336. *Scott v. Brest*, 2 *Term Rep.* 241.

In an action upon a lease for rent, &c. founded on the privity of *contract*, as in *debt* by the lessor against the lessee, 6 *Mod.* 194. 2 *Str.* 776, or his executor in the *detinet* only, *Gilb.* 403, or in covenant by the lessor, 3 *Lev.* 154, or grantee of the reversion, 1 *Saund.* 238, 1 *Wils.* 165, *Carth.* 183, against the lessee the action is *transitory*; and the venue may be laid in any county, at the option of the plaintiff.

Holt C. J. said, if a cause of action arises partly in one county, and partly in another, it is in the election of the plaintiff to lay it in which county he pleases.

When the action is founded on two things, in different counties, how to be brought.

Matter of record.

Action on lease for rent.

If it arises partly in one county, and partly in another.

As if a country chapman sends a letter to a tradesman in *London*, to send him goods into the *country*, he delivers them accordingly, and they come to the chapman's hands, there the cause of action arising in both counties, he may lay them in either. 12 *Mod.* 76.

If assault happen
abroad, may lay
venue in *London*.

If an assault and imprisonment happens at *Minorca*, it may be laid at *London*, in the parish of *St. Mary-le-Bow* in the ward of *Cheap*; *Fabricas v. Mostyn*, *Hill. T.* 1775; and if the plaintiff is banished from *Minorca* or *Carthage*, it may be laid in *Minorca*, to wit, at *London*, &c. *Cowp. Rep.* 178.

Every transitory action may be laid in any county in *England*, though the matter arise beyond the seas. *Ibid.* 181. But if it should be such an action as renders it necessary to state where it arose, as on a deed, bill of exchange, &c. the *real place* may be alledged; as for instance, if on bond, it should be stated to have been made at *Fort St. George* in the *East Indies*, to wit, at *London*, in the parish of *St. Mary-le-Bow* in the ward of *Cheap*: For if the bond be stated to have been made in *London*, and, on oyer, it appear dated at *Fort St. George*, or the like, it would be bad on special demurrer. *Ibid.* 178. 3 *Term Rep.* 387. *Mellor v. Barber*.

Wales.

It is said, a venue cannot be laid in *Wales* in a transitory action, the cause whereof did arise in *England*. *Lill. P. R.* 783.

A declaration was laid in *Norwich*, but *Norfolk* in the margin, inquiry executed there; court held, it was helped by stat. 4 & 5 *Ann. c.* 16. *Howes v. Haslewood*, *Com.* 155.

Actions on penal
statutes to be laid
in their proper
county.

By stat. 21 *Jac. I. c.* 4. All suits on penal statutes shall be laid in their proper county, and if on the general issue pleaded, the offence be not proved in the same county in which it is laid, the defendant shall not be found guilty.

If rent be re-
ceived in *Mid-*
dlesex, and ac-
count settled in
London, in an
action for usury.

A. by deed executed in *London*, for the securing the repayment of money lent to *B.* was appointed receiver of *B.*'s rent in *Middlesex*, with a pretended salary, which enabled him to retain usurious interest. He received the rent in *Middlesex*, but settled the account in *London*, and there paid the balance, on which the usurious interest is allowed. The offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott qui tam v. Bress*, 2 *Term Rep.* 238. *Vide Douglas* 223.

This

This act does not extend to any offence created *since* the statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is as to them, as it were, repealed *pro tanto*, 1 Salk. 372. by ten judges. Secondly, That all informations and popular actions on penal statutes made before that act must by force of 21 Jac. c. 4. be laid, brought, and prosecuted, in the *proper county* where the fact was done. *Ibid.* Bunbury 236.

Construction of the act 21 Jac.

In an action for infringing a patent, venue in *Middlesex*, the defendant cannot change it into any other county; for it is manifest that the *substratum* of the action, namely the *patent*, is at *Westminster*. *Cameron v. Gray*, 6 Term Rep. 363.

In an action on a patent.

"If actions are brought against any justice, mayor, or bailiff of any city, town corporate, head-borough, portreeve, constable, tithing man, collector of subsidy, fifteenths, church-wardens, and other persons called sworn men, executing the office of church-warden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, &c. the venue must be laid where the fact was committed, or the defendant must be found not guilty." Stat. 21 Jac. 1. c. 12. sect. 5. *Vide Str.* 446. *Vaughan* 133.

So against officers, &c.

If an action be against a justice for any thing done by colour or under pretence of his office, though not strictly within the duty of his office, it comes within this act. *Daniel v. Wood*, 5 Term Rep. 1. *Vide Str.* 446.

Justices, &c.

In an action of assault and imprisonment against defendant who was a *turnpike man*, keeping a gate in the county of *Surry*—the venue was in *Kent*. The plaintiff attempted to pass through the turnpike gate in a chaise which defendant thought was hired, and for which he insisted upon the duty imposed by 25 Geo. 3. c. 51. upon post horses; the court held, it was a *transitory action*, and the venue laid right. *Bazing v. Skelton*, 5 Term Rep. 16.

Turnpike man, when action transitory.

But by the 13 Geo. 3. c. 78. s. 81. the general highway act, the venue must be laid in the county where the fact was committed.

Highway act, venue local.

For actions against revenue officers, vide 9 Geo. 2. c. 35. s. 26.; 20 Geo. 3. c. 70. s. 34. as to excise officers;

Revenue officers.

cers; as to custom house officers, 24 Geo. 3. *Seff.* 2. c. 47. s. 35. 4 *Term Rep.* 490. *Rex v. Cartwright.*

Nuisances.

A nuisance must be laid in the proper county. *Cra. Car.* 133. *Jones* 43.

If no venue be laid in the body of the declaration.

The county in the margin of the declaration will help, but not hurt. Hence if there be no *venue* laid in the body of the declaration, reference must be had to the margin; but where a proper *venue* is laid in the body, the word in the margin will not vitiate it. *Cas. Temp. Hard.* 343, 344. 3 *Term Rep.* 387. *Mellor v. Barber.*

Attornies.

Where an attorney is plaintiff, and sues in his own court by *attachment of privilege*, he may lay the *venue* in *Middlesex*, and it cannot be changed. *Pope v. Redfearne, one, &c.* 4 *Burr.* 2027. 3 *T. Rep.* 573. But an attorney defendant has not the privilege of changing the *venue* into *Middlesex*, where it is laid in another county. *Ibid.* 2 *Str.* 1049. *contra.*

Debt for or against lessee, or assignee.

Debt for rent on indenture laid to be made at *London*, for the demise of lands in *Surrey*. The action was laid in *London*. On demurrer it was held, that the plaintiff had his election to bring it in either against the lessee; otherwise had it been against an assignee who is chargeable only on the *privity* of estate. *Pater-son v. Scot*, 2 *Str.* 776.

Where when the *visne* is laid for the first matter in the count, all the matter which follows, refers to the said *visne*. 1 *Saund.* 229.

Where a certain place cannot be known whence the venue should be, the venue is to be *de corp. comitatus*; and so it is where a custom of the county is to be tried. *Lill. Pr. Reg.* 780.

Case for forging a will brought in *Middlesex*; the lapd comprized in it lay in *Suffolk*, the venue was changed into *Suffolk*. *Ray.* 33.

Of changing the Venue in transitory Actions.

The *stat.* of 6 R. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the *venue*, if required, and not to insist rigidly on abating the writ, which practice began in the reign of James the First, 2 *Salk.* 670. and this power is discretionally exercised,

so as not to cause but prevent a defect of justice; therefore the court will not change the venue if moved in Michaelmas or Hilary term to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit, 1 *Wils.* 138. *Nicholls v. Bolster*; nor can it be changed, but to a county where the whole cause of action arose, 1 *Wils.* 178. *Herring v. Durant*; which was a motion to change the venue from London to Kent, on an affidavit that the cause of action arose upon Kingsbridge, partly in the county of Kent, and partly in the city of Canterbury, and not elsewhere.

The defendant in all transitory actions is generally allowed to change the venue in case the plaintiff does not lay it in the proper county, where the whole cause of action arose; and he may change it from London to Middlesex, or vice versa. 2 *Str.* 857. *Gifford v. Lechmere*. 2 *Term Rep.* 275.

In order therefore to change the venue, it is indispensibly necessary that the cause of action should be wholly confined to a single county.

In debt on bond, or other specialty; promissory notes, and bills of exchange, the court will not change the venue, because they are *bona notabilia* any where, unless there be some special ground^a. *Say.* 7. *Kerk v. Broad*. 1 *Wils.* 41. *Anon.* 1 *Sid.* 87. *Carth.* 400. *Vent.* 363. *Barn.* 480. 483. 492. So in covenant. *Leon.* 307. *Barn.* 491. So debt for rent. *Dupleffis v. Chalk*, 2 *Str.* 878. So in actions for scandal mag. by a peer or peers of the realm, *Lady Falconbridge v. Forest*, 2 *Str.* 807. *Ld. Ray.* 1418. *Salk.* 668. because the scandal reflects on him through the whole kingdom. So in an action for a libel, published in a newspaper in one county, and circulated in other counties. *Pinkney v. Collins*, 1 *Term Rep.* 571. *Hoskins v. Ridgway*. *S. D.* So where a libellous letter was written in Berks, but directed in Surrey, the venue being laid in London, court refused to change it in Berkshire. *Cliffold v. Cliffold*, 1 *Term Rep.* 647. So in an action against a carrier or lighterman, 2 *Salk.* 670.; or for an escape, 1 *Sid.* 87.; or false return, 1 *Wils.* 336. *Griffith v. Walker*. *Cro. Car.* 211. *Sty.* 107. *Plowd.* 37. b. And the reason is, that defendant cannot make the usual affidavit, that the cause of action arose in a single county, and not elsewhere.

Court will not change the venue to any of the four northern counties, previous to spring circuit.

In what actions venue cannot be changed.

^a 1 *T. Rep.* 781.

Peer.

But if such peer have interest, it may be changed. *Skin.* 40.

In what actions
venue may be
changed.

Libel.

Libel written in
Yorkshire, and
sent to Germany.

After venue
changed on the
common affida-
vit, court will
not alter it,
though wit-
nesses live in
Scotland, and
are willing to
come to Carlisle.

In debt where
both parties'
witnesses
live in one
county.

No rule better
established than
all causes shall
be tried in pro-
per county
where fact com-
mitted,
unless a fair
trial cannot be
had there.

But it seems the venue may be changed in an action not being by deed, or in any other action, the right of which is founded upon simple contract, *Say. Rep. 7.*; therefore in an action on a policy of insurance, not being by deed, the venue may be changed. *Howarth v. Willett. 2 Str. 1180. Andr. 66. 2 T. Rep. 275.* In an action for a libel written in one place and sent to another, both in the same county, the venue was changed into the county in which it was both written and published. *Freeman v. Norris, 3 Term Rep. 306.*

In an action for a libel in a letter written in Yorkshire, and sent by the post into Germany, the court ordered the venue to be changed from London to Yorkshire. *Metcalf v. Markham, 3 Term Rep. 652.*

Rule to change the venue from Cumberland to London on the common affidavit. Motion to discharge it on account of defendant's witnesses living in Scotland, and were willing to come to Carlisle to give evidence, and that there was no process to oblige the witnesses to come to London. Court. Here is the common affidavit, which is the law of the court, and as such, is the law of the land, and therefore denied the motion. *Fogoe v. Gale, 1 Wilf. 162.*

But in debt on bond, where venue was laid in London, both plaintiff and defendant's witnesses lived in Lincolnshire, the court changed it into the latter county; saying, when a serious defence was intended to be made, it was reasonable to grant such an application; defendant undertook to give judgment of the term, and not to bring error. *Foster v. Taylor, 1 Term Rep. 781.*

When a fair Trial cannot be had, though laid in the proper County.

There is no rule better established, than "that all causes shall be tried in the county, and by the neighbourhood of the place where the fact is committed;" and therefore the rule ought never to be infringed, unless it plainly appears, that a fair and impartial trial cannot be had in that county; where that does plainly appear, the court has power to depart from the general rule. *Sty. Prac. Reg. 540. M. 22 Car.*

After verdict and motion for a new trial, on shewing cause why the venue should not be changed from the city of Chester to the county at large, the court said, that

that in transitory actions they ought to change the venue, when it appears, upon circumstances laid before them, that there is a probable ground to apprehend, a fair, impartial, or at least a satisfactory trial cannot be had. Rule abs. *Mylock v. Saladine*, 2 Burr. 1564. In this case verdict was against the weight of the evidence, and the damages excessive, and strong proof by affidavits, of a general prejudice in the city.

After time to plead given on terms of taking short notice of trial for the first sittings in the next term for *Middlesex*, in an action for words spoken of a justice of the peace, by a candidate upon the hustings at a county election, a rule was obtained to change the venue into *Gloucestershire*. Motion to set it aside, as there could not be a fair and impartial trial in *Gloucestershire*. Court said, the rule ought to be set aside on either ground, and discharged the first rule. *Petyt v. Berkeley, Esq* Cowp. Rep. 510.

If on terms of taking short notice.

In *The King v. Harris* and others, on a rule to shew cause, why the cause (which was an information) should not be tried at the assizes for the county of *Gloucester* by a jury of the said county, instead of the city; the affidavit to found the motion stated generally, that they verily believed, that there could not be a fair and impartial trial had, by a jury of the city of *Gloucester*, without other reasons for entertaining such belief, which was an information for a misdemeanor, in refusing to admit several persons to their freedom of the city, who demanded and were entitled to it, to vote at the then approaching election for members, and whom the defendants did admit, after the election was over, but refused prior, and thereby deprived them of their right of voting at it. The prosecutors moved for this rule, supposing the citizens could not but be under an influence or prejudice in this matter, though there was a list returned of above 600 persons duly qualified to serve on the jury. The counsel for the prosecutors prayed to have the rule made absolute, and that they might have liberty to enter a suggestion on the record, that there could not be a fair and impartial trial had in the county of the city, and therefore prayed that the venire might be directed to the sheriff of the county of *Gloucester* to return a jury out of the county at large; and cited *Cliff's Ent.* 741. 2 Burr. 863. *Lord Mansfield*. No two things can be more different than changing

changing the venue, and continuing it as it was, with such a suggestion on the roll as is now proposed. In *Rex v. Burton* the motion was to change the venue: this is, to enter a suggestion on the roll, with a *venire dedire*. Notwithstanding the locality of some sort of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or cannot be fairly or impartially tried in the proper county, it shall be tried in the next adjoining county. The case of *Berwick* was determined upon the foundation, "*That the writ of venire facias did not run there.*" And so it is likewise in the Cinque Ports. In these cases, there could be no trial had at all. But as the party cannot traverse such a suggestion, when entered by rule of court, there must be a *clear and solid foundation for it*. This general swearing is not a sufficient ground, especially as it is sworn there are 600 persons duly qualified to serve. The question is no general question of right, nor can it affect the corporation in future. Here is a want of foundation in *fact* of such a suggestion, and therefore no reason for the court's granting it. *Denison J.* Where an impartial trial cannot be had in the proper county, the *venire* may be awarded to the next county. In a *Norwich* case relating to a bridge, the city of *Norwich* and the county at large being *both interested*, venue was awarded into *Suffolk*. But there ought to be the clearest evidence in the world, to ground such a suggestion upon; or it must arise out of the record itself. This does not arise out of the record, nor is there sufficient ground to support it. The case of *The King against Burton et al.* T. 27, 28 Geo. 2. 1754. in *Nottingham*, was a motion to change the venue. In this method of entering a suggestion upon the roll, the venue remains; and the court only award the *venire* to the next adjoining county, but they ought not to do it in this case; because the place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it; which is not the present case. *Wilmot, J.* The rule about entering suggestions upon the record is, "*that the facts proving that a fair and impartial trial cannot be had in the ordinary course, must be themselves suggested upon the record.*" Rule disch. 3 *Burr.* 1330.

In the case *Rex v. Cowle*, the defendant with five others swore, that he could not have a fair trial, owing

to party differences and great contentions in the borough of *Berwick*: that the justice, before he was to be tried, warmly supported a motion to disfranchise him for the offence laid in the indictment; which was rejected by a majority of the burgesses: that the matter of the indictment rose at an assembly of the corporation, in consequence of a violent division which engaged the whole body; therefore the *certiorari* granted to remove the indictment in this court stood, and was ordered to be returned and filed, defendants to plead, and proceed to trial at the next assizes for *Northumberland*; and the form of the suggestion was as follows: And because the borough of *Berwick* is a place where the king's writ of *venire facias*, to summon a jury to try the said issue, doth not run; and because the burgesses of the said borough, by reason of their privileges, ought not to be put upon any jury to try the said issue out of the said borough; but the said issue ought to be tried by a jury of the county of *Northumberland*, which is the next adjacent county to the said borough of *Berwick*; which allegations of the said *H. C.* are not denied by the said *James Burrow*, Esq. therefore it is commanded the sheriff of *Northumberland* do not forbear by reason of any liberty in his bailiwick, but that he cause to come, &c. The entry upon the record has a clause of *non omittas* always inserted on the crown side. 2 *Burr.* 834 to 863.

Form of suggestion.

Berwick is only a borough, it has neither *jura regalia*, nor superior courts; *Wales* has both. A small part of the county of *Durham* is nearer to *Berwick* than *Northumberland* is. But at the time of first sending process to the latter, the king's writ did not run to the former, being a county palatine. So that *Northumberland* was the nearest *English* county, for the purpose of trial; as the king's writ did not run to *Durham*. *Ibid.* 861.

If a fair trial cannot be had in *Wales*, a *certiorari* will be granted. 1 *Str.* 704. *Rex v. Lewis*.

The action was laid in the county of *Poole*, and for a duty claimed to be due to the corporation; court ordered the venue to be changed to *Hampshire*, as a fair trial could not be had there. *Mayor of Poole v. Bennett*, 2 *Str.* 874.

Where the offence arose in the city of *Chester*, and a fair trial could not be had there, the venue was awarded

awarded into the county of *Salop.* *Rex v. Amery*,
1 *Term Rep.* 363.

In 12 *Mod.* 313. the court said, they could not order a trial in the *county palatine of Lancaster*, and therefore they sent the record to be tried in *Yorkshire*.

The motion.

Therefore, in these cases, the motion is to *try the cause in the next county*, and not to change the venue.

Debt on bond.

Debt on bond made at *Derby* to the intestate, the declaration alledged administration was granted to the plaintiff by the bishop of *Litchfield and Coventry*; and the venue in the margin in *London*. The defendant demurred generally. *Buller, J.* On a special demurrer, there might have been some doubt. But a bad venue, or the want of one, is cured by the statute of jeofails. *Grose, J.* Here the venue is laid in the body of the declaration at *Derby*; the addition of *London* in the margin will not vitiate it. *Mellor adm. v. Barber*, 3 *Term Rep.* 387.

Bad venue, or want of one.

Wales.

It is not settled whether the court can change the venue from an *English*, to a *Welsh* county. *Dougl. Rep.* 262. *Pritchard v. Pugh*.

Mr. J. Buller said, the doubt was to whom the writ of inquiry must be directed in case of judgment by default.

The motion.

The motion must be to *change the venue into the Welsh county*, and not into the adjoining *English* county; because of the affidavit: but after the venue is so changed, the cause may be ordered to be tried in the next adjoining *English* county. 2 *Black. Rep.* 962. *N. B.* The practice in case judgment goes by default is, to direct the enquiry to the *Welsh* sheriff.

There is good reason to refuse the venue being changed from an *English* county to the next *English* county, because the affidavit cannot be departed from.

Lord Mansfield, on a motion to change the venue from *Middlesex* to *Denbighshire*, said, he did not at first see why the court should refuse to change it into the next *English* county; as the same reasons seemed to hold for doing that, as for changing it from one *English* county, into another *English* county. But *Mr. J. Denison* had satisfied him that there was a good reason for refusing it: which is, that the form of the affidavit is so religiously settled, that it cannot be departed from; and in the case of changing it into the next *English* county, they cannot swear in that form which is essentially requisite on such motions; namely, That the cause of action arose in the county which is prayed to change the venue, and not elsewhere out of the said county,

where

where it was originally laid. *Waddington v. Thelwell*, *Esq.* 4 *Burr.* 2450.

But the court changed the venue from *Middlesex* into *Wales*, no cause being shewn. *Ibid.*

The venue cannot be changed into a county palatine; but it was changed into *Chester*, because the court can send down the record by mittimus. *Lord Ray.* 1418. 1 *Wils.* 222.

Cannot be changed into a county palatine.

It cannot be changed if it will delay trial, as to *Bristol*^a. *Str.* 1180. *Howarth v. Willett*. Nor changed to a third county without consent. *Ibid.* 1216. *South-house v. Boak*.

Nor to delay.

Motion to change the venue from *Bristol* to the next adjacent county. *Cur.* The way is not to change the venue, but to try it in the next county. *The Mayor, &c. of Bristol v. —*. In ejectment. 1 *Wils.* 77.

If venue be laid in Bristol, it must be to try in next county.

The venue may not be changed from a county at large into a city and county, *Barnes* 388.; but it has been changed from a county at large into *London*, *ibid.* *Salk.* 670.; and it may be changed from one county and city into another county and city, *Prac. Reg. C. P.* 429.; but it cannot be changed into *Hull*, *Canterbury*, &c. because it is not known when an assize will be held there; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are held at the same place: but the reporter says, all this is in the discretion of the court. *Barnes* 490. But where the assizes are held twice a year, it is a matter of course to change the venue. *R. M.* 1654. f. 5.

In what cases it may be changed from a county at large, into a city and county.

As to Privileged Persons.

Serjeants at law, *Barn.* 484.; *barristers*, 2 *Show.* 176.; *attornies*, *Salk.* 668.; or other officers of the court, suing as privileged persons, and laying the venue in *Middlesex*, have a right to retain it there, because their attendance is necessary at the courts at *Westminster*. *Pilking-ton v. Hamlin*, *Say.* 153. *Salk.* 608. But if the venue be laid in any other county, as *London*, 2 *Vent.* 47. *Salk.* 668.; or if such a privileged person sue as a common person (as by *capias*), or *en auter droit*, as executor or administrator, or jointly with his wife or others, he has no such privilege. *Barn.* 479. 484.

Serjeants, barristers, attornies, &c.

And if either of these persons are defendants, they have no privilege to have the venue changed into *Middlesex*.

If they sue as a common person by *capias*.

If either of them be defendants.

^a There are no Lent assizes held at *Bristol*.

Pope v. Readfern, 4 Burr. 2027. *Yeardley v. Roe*, 3 Term Rep. 573. 3 Mod. 280. *Bisse v. Harcourt*. So in the C. P. And the reason is, that it is not necessary *when defendant*, to attend the trial in the country in person: but formerly this was otherwise. 2 Str. 1049. *Wigley v. Morgan, one, &c. N. on R. M.* 10 Geo. 2. Reg. 2.

Clerk of assize.

It is said that a *clerk of assize* is on the same footing respecting the laying the venue when plaintiff; as an attorney. 2 Ld. Ray. 1253. Salk. 670.

On removal from cities, &c.

That upon a cause removed by habeas corpus, out of the courts of *Canterbury, Southampton, Hull, Litchfield, or Pool*, if the action be transitory, the venue must be laid in the county of *Kent, Southampton, York, Stafford, or Dorset*, where the town and county lieth. R. M. 1654. f. 9.

Within what Time the Venue may be changed.

Plaintiff after effoign day of subsequent term after appearance, not to alter venue.

The plaintiff after the *effoign day* of the subsequent term after appearance, shall not alter his *own* venue, though he would pay costs or give imparlance. *Maf. Livesey*, 2 Lill. Pract. Reg. 778. Str. 211. 858. N. on R. M. 10 Geo. 2.

When the venue may be changed.

The defendant cannot move to change the venue in any action until his *appearance* be entered; nor after plea pleaded, *Loft. Rep.* 321. although declaration be amended. *Lil.* 783.

After issue it was changed, in debt, witnesses for both parties living in Lincolnshire, there being a serious defence.

But after issue joined in debt on bond, and the cause in the paper for the sittings after *Easter term*, on motion in *that term*, it was changed from *London* to *Lincoln*, on the ground that the witnesses for both parties lived in *Lincolnshire*, and that there was a *serious defence* intended to be made; the defendant undertaking to give judgment of *Trinity term*, and not to bring a writ of error. The pleas were, *non est factum, solvit post diem*, and *usury*. *Foster v. Taylor*, 1 Term Rep. 781. But the court will not change the venue "*because the witnesses live in that county.*" *Ibid.*

Venue, when changeable in transitory actions,

That although the declaration be delivered *seven days* before the *last day* of the *next preceding term*, or after, yet before plea, upon oath made, the venue may be changed upon motion in the said transitory actions
the

the next term after; and the defendant to plead to the new action as he should have done, without delay.

R. Mich. 1654. sect. 5. "That the *venue* may be changed (upon oath), though the defendant come in "by exigent." *Ibid.*

Per Cur. If the declaration be delivered so early in term, that the defendant has *eight days* in that term, he cannot move to change the *venue* the next term. *Str.*

211. *Asplin v. Gray.*

The *venue* may be changed after an order for time to plead, though upon the terms of pleading *issuably*; but not after such an order when the terms are, *to plead issuably, and take short notice of trial at the first sittings* in London or *Middlesex*, because there a trial would be lost. *Cowp. Rep. 511. Petyt v. Berkely, Esq. contra 1 Wils. 245. Wightman v. Thompson.*

The general mode is, to have it inserted in the order, *to be at liberty to change the venue.*

The defendant obtained a rule to change the *venue* from *Middlesex* to *Gloucester*, where cause of action arose; motion to set it aside. It was objected to, because the defendant was too late, inasmuch as he had previously applied for and obtained an order to try the first sitting in *Middlesex*. The action was for words spoke at the time of an election for *Gloucester*, and it was said there could not be a fair and impartial trial. Lord Mansfield said, upon either ground, the rule for discharging the rule obtained, should be made absolute. *Cowp. 511.*

It was held that as the defendant must move to change the *venue* before plea pleaded; so the plaintiff must in like manner move to discharge the rule, on undertaking to give material evidence, before replication. *Dickenson v. Fisher, Str. 858.*

Though the plaintiff cannot regularly move to change the *venue*, yet he may in effect do it by moving to amend; and it was done so by striking out *Derbyshire*, and inserting *Middlesex*. *Stroud v. Tilly, Str. 1162.* The court suffered the plaintiff to amend the *venue*, after defendant had changed it upon the common affidavit, *ib. 1202.* but never suffer it to be changed in debt, *ib. 878. Duplessis v. Chalk. Str. 878. Fitzgib. 166. Barn. 379.*

When to plead thereto.

May be changed, if defendant comes in by exigent.

May be changed, after order for time, but not when upon terms.

Nor when on terms to try the first sitting in *Middlesex*.

Plaintiff must move to discharge before replication.

Plaintiff cannot change the *venue*, but he may do it by amending.

The Method of moving to change the Venue.

How to move
to change the
venue.

No notice is necessary to be given to the plaintiff's attorney, previous to the motion to change the venue, but the client makes the following affidavit; which give to counsel, with 10s. 6d. for him to move; the rule is absolute in the first instance; in the evening draw up rule, pay for the same 5s. filing affidavit, if sworn in the country, 2s. serve copy on plaintiff's attorney; the plaintiff's attorney will alter the declaration; if he does not, it will be considered as altered by the rule.

After venue
changed, when
to plead.

After changing the venue, the defendant must plead, as he should have done before without delay. *R. M.* 1654. f. 5.

John Denn, plaintiff,
and
Richard Fenn, defendant.

In the King's Bench.

Affidavit.

Richard Fenn, of Bread-street, London, factor. The above defendant, maketh oath and saith, That the plaintiff's cause of action, mentioned in the declaration in this cause (if any such there be), arose in the county of *A.* and not in the county of *B.*^a or elsewhere out of the county of *A.*

How in vacation.

If in vacation, apply to a judge for an order, which will be made on producing the affidavit with a counsel's hand, the plaintiff being at liberty to change the same back again, on undertaking to give evidence in the former county, pay order 4s. counsel 10s. 6d. rule 6s. serve it on plaintiff's attorney.

By original the venue cannot be changed, but on condition that defendant does not assign the want of an original for error.

Of bringing back the Venue by the Plaintiff.

Upon plaintiff's
undertaking to
give evidence of
some matter in
issue arising in
the county, the
rule to change
the venue will
be discharged.

Notwithstanding the defendant has it in his power to remove the venue from the place laid, to the place where the cause of action arose, the plaintiff may, on shewing cause, "undertake to give material evidence of

^a (*Where the venue is laid*). *N. on R. M.* 10 Geo. 2. Reg. 2. S'y. P. R. 543. *Lil P. R.* 782.

The affidavit must be positive, and not to belief; and may be made by one defendant, although there be more, *Barn.* 482.

" *same*

"some matter in issue, arising in the county wherein the action is laid;" in that case, the rule will be discharged; but if at the trial he fails therein, he must be nonsuited. 2 Black. Rep. 1031. For it is not enough to say, that the witnesses to prove the contract resided there. *Ibid.*

After the venue had been changed from London to Lincolnshire by defendant, the cause had gone down to trial at Lincoln assizes, where the plaintiff was nonsuited. New trial directed. The cause went down a second time to the assizes at Lincoln, and made a *re-manet* for defect of jurors. There was a rule obtained for bringing back the venue to London, upon undertaking to give material evidence there. The objection made was, that it was too late after all these proceedings, and therefore the defendant moved to discharge that rule. Lord Mansfield said, we desired the master to enquire into the practice, whether the plaintiff could bring back the venue after plea pleaded. He has met with two cases in Str. 858. *Dickenson v. Fisher*; & 162. *Stroud v. Filly*. We think it an idle circuitry to put the plaintiff to move to amend his declaration in order to come at an alteration in the venue, and if we permit him now to bring it back, he does it at his peril, because if he does not give material evidence in London, he must be nonsuited; and if it should appear to be a local action by statute, he will be nonsuited upon the opening. The former rule must stand, and take nothing by the latter. *Bruckshaw v. Hopkins*, Cowp. Rep. 409.

The venue was brought back after two trials, on plaintiff's undertaking to give material evidence in London.

The undertaking is absolutely necessary, for it is not sufficient for the plaintiff to swear that his cause of action arose where the venue is laid. *French v. Coppinger*, 1 H. Black. Rep. 216.

Action of assumpsit, the venue was changed by a rule of court from Middlesex to London, and the rule was afterwards discharged, on the plaintiff's undertaking to give in evidence some matter in issue, arising in the county of Middlesex, where the action was first laid; after which the defendant paid 71l. into court. The plaintiff produced an office copy of the rule, and the judge was of opinion that it was sufficient. *Watkins v. Towers & others*, 2 Term Rep. 276.

Rule for payment of money into court held sufficient.

So if the cause of action arose abroad, it is sufficient to prove it. *Gerard v. Roebeck*, 1 H. Black. Rep. 280.

If the issue is altered, cannot be brought back.

The rule to change the *venue* was obtained, and the plaintiff's agent *altered the issue* accordingly; and *delivered it over*; and then he applied to *bring back* the venue to *Middlesex*; the court discharged the rule *nisi*, but without costs. — v. *Boddington & al.* *M. 20 Geo. 3. cited in Crompt.*

Formerly it was required to give evidence in the county wherein the venue was retained, or be nonsuited.

But since bound only to give some evidence;

or be nonsuited.

If after rule to change, the plaintiff undertakes to bring venue back, must give evidence of some matter in that county.

Originally it was required, that the plaintiff should give no evidence at the trial, but what arose in the county wherein the *venue* was retained. 1 *Keb.* 189. 1 *Sid.* 442. If he gave none such, he must have been nonsuited of course. But when it was laid down in *Swain's case*, 1 *Sid.* 405. that the plaintiff might lay his *venue* in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole, in the county where the *venue* was laid, *Salk.* 669. 12 *Mod.* 515. which continues to be the rule at this day. And if the plaintiff fails to make good his undertaking, he is nonsuited now, which has the same effect as judgment for the defendant in a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again. 2 *Black. Rep.* 1034.

Where a rule is made to change the *venue*, and afterwards the plaintiff would bring it back again, the rule must be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought. *Salk.* 669.

Rule to Plead.

THE rule to plead is an order of the court, and intended to give the defendant notice when he is to plead. But if the defendant obtain a rule of court, or an order from a judge, for time to plead, this excludes any presumption that the plaintiff has not given him such notice; therefore in such case the court have held a rule to plead unnecessary. *Starkie v. Wilkes*, *M. 7 Geo. 2.*

Anciently there were two rules to plead given, of four days each; the first, *ad respondendum*; the second, *ad respondendum peremptoriè*. 2 *Salk.* 517. These were afterwards converted into one eight-day rule, *Ibid.* In *Trin.* 1 *Geo. 2.* the time for pleading was shortened to four

four days. When the rules to plead ran for *eight days*, the course of the court was to allow the *four first* only for *pleas in abatement*; but as to pleas in *chief*, it was sufficient if they came in *any time before judgment signed.* *Long v. Miller, 2 Str. 1192.*

The rule to plead cannot be given on a *Sunday*, or on the *Purification*; and if the rule expires on a *Sunday*, the defendant has all the next day to plead in. *1 Str.*
86. *Anon.*

A rule to plead ought to be given *after* declaration delivered, or filed, and not *before.*

Before a plea *in bar* can be *compelled*, or a plaintiff become entitled to judgment for want of it, a rule to plead must be *entered* with the clerk of the rules.

But if a defendant is bound by *rule or order of court*, to plead by a time therein limited, it is incumbent on him to plead by such time, although the plaintiff does not enter any rule to plead, or call for a plea. *N. on R. T. 5 & 6 Geo. 2.*

If a rule to plead be entered the *same term* an amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. *N. on Rule M. 10 Geo. 2. 2 Salk. 517.*

In case it should be necessary for a *term's notice* to be given before plea, (as if four terms are elapsed,) then the rule to plead is to be given the day after the last day of the term after such notice, or within the four days. As for instance, before the *essoign* of *Hilary* notice is given that you intend to proceed by giving a rule to plead; give the rule the 13th *Feb.* demand the plea, and if no plea, sign judgment, *Milbourn v. Nixon and others, 2 Term Rep. 40.* where the court held that although the judgment appeared of *Hilary* term, yet the defendant had the full benefit of the rule.

The rule is given by delivering a slip of paper to the clerk of the rules, with the title of the cause in this form;

Johnson v. Sprat.
Den v. Ray.

Rules to plead.

A. K. attorney.

Form of the rule.

Take it to the clerk of the rules in *Symond's Inn*; pay him for each rule 1s. 10d. which he enters in a book kept for that purpose. The rule expires in *four days inclusive*, but no judgment can be signed until *four days exclusive* of the day it is given; and *Sunday*, or an *holy-day*.

day on which the court does not sit, is to be accounted a day within the said rule (except it happen on the last day). It may be given any time in term, or within four days after.

When not
necessary.

It is not necessary to give a new rule to plead, if there be a judge's order, which does not expire till the first or second day of the next term: But in all other cases, there should be a new rule to plead, to warrant the judgment signed, as *of that term*, in which it is so signed. *Gilb. Rep.* 318.

The clerk of the rules will accept a rule to plead on the *essoign day*, but such rule cannot be entered until the *first day of term*.

When rule to
plead dispensed
with.

The defendant may dispense with the rule, either by pleading in *abatement*, or in *bar*. *Brandon v. Payne*, 1 *Term Rep.* 690.

If defendant dies.

If defendant dies *after* rule given, and before interlocutory judgment signed, the suit is abated. 1 *Wilf.* 315. *Wallop v. Irvin*.

When rule may
be given.

The rule may be given the same day the declaration is filed *de bene esse*, or in *chief*, *after filing or delivery*.

Of obtaining Time to plead.

If the defendant be not ready to plead by the expiration of the time allowed him for that purpose, his attorney or agent may obtain a summons from a judge (but it must be a day previous to the expiration of his time) to shew cause why the defendant should not have a week's time. If such summons be returnable *before the plaintiff can sign judgment*, it is a *stay* of proceedings, *Say. Rep.* 165; but it is otherwise when taken out or returnable, *after the expiration of the time for pleading*, provided the plaintiff proceeds. *Vide 2 Black. Rep.* 954.

Terms.

A copy of the summons is to be served on the plaintiff's attorney, who will either indorse his consent thereto, or attend the judge; but defendant, in town causes, will be bound down to terms of *taking short notice of trial, pleading issuably, and rejoining gratis*, if plaintiff was in time to proceed to the trial, if not, only pleading issuably.

N. B. The plaintiff's attorney may (though it is very unusual) stay till the *third* summons before an order can be made. And if default is made on the third

third summons, the judge will, on affidavit of the service and attendances, make an order *ex parte*.

If the plea cannot be obtained in time, the judge will grant *further time*, if necessary, by a second summons, provided the plaintiff be not delayed. Further time may be obtained.

N. B. A month's time to plead is a *lunar month*, or four weeks, and not a *calendar month*. 3 *Burr.* 1455. *Tullett v. Linfield*; and is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires. How time reckoned.

The order must be served in like manner as the summons.

Where the defendant is an *executor* or *administrator*, the order will be for him not to plead any judgments, since the time for pleading was out, 8 *Mod.* 308. for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand.

What is a Plea within the Meaning of an Order.

When the defendant is under a judge's order to plead *issuably*, and pleads a plea which is *not issuable*, the plaintiff may consider it as a *mere nullity*, and sign judgment.

But a plea of the stat. 23 *H. 6. c. 10.* against sheriffs taking bonds *ex colore officii* was held to be a plea within the order. *Dearden v. Holden*, 1 *Burr.* 605. The judge's order does not confine the defendant to plead the general issue. *Ibid.*

A plea of a judgment recovered, or in abatement, is not within the order. 1 *Black. Rep.* 376. 1 *Burr.* 59.

To an action on the judgment, on an order to plead *issuably*, rejoin *gratis*, and take short notice of trial for the next assizes; the defendant pleaded *nil debet*, and *nul tiel record*, the master was of opinion, that these were issuable pleas under the order; that you might go to trial on the first, and give the day to produce the record the first day of the next term in the replication. Nil debet and nul tiel record pleaded after an order.

A plea of tender has been deemed an issuable plea, 1 *Burr.* 59, *Kilwick v. Maidman*. And the general issue, and statute of limitations is held an issuable plea within the order. *Rucker v. Hannay*, 3 *Term Rep.* 124. *contra* 2 *Vol.* 390. *Studholme v. Hodgson*. But where the defendant being under an order to plead *issuably*, and he pleaded several pleas, all of which

were issuable, except one, plaintiff signed judgment, as for want of a plea; the judgment was held regular, because one plea was pleaded in disobedience of the order. *Waterfall v. Glode*, 3 Term Rep. 305.

Demurrer.

A real and fair demurrer is an issuable plea within the meaning of a judge's order, but a sham demurrer is not. *Gray v. Ashton*, 3 Burr. 1788.

If a real cause may demur.

If a defendant be under terms of rejoining gratis, and there is a real cause of demurrer to the replication, he may demur. 2 Str. 1185. *Dewey v. Sopp*.

Pleading issuably, means pleading such an issue as the plaintiff may go to trial upon. 2 Burr. 782. *Foster v. Snow*.

Executors.

If an executor be not confined by a judge's order to plead, no judgments confessed after rule to plead expired; he may plead such judgments confessed, being issuable pleas. *Vide Barn.* 330. *Hughes v. Pellett*.

When Defendant ought to plead.

If a declaration be delivered *de bene esse*, on common process, he is to plead in eight days after filing or delivery. *R. Trin.* 22 Geo. 3.

If *de bene esse* on special bail, if the action be laid in London or Middlesex, and the defendant lives within twenty miles of London, then to plead in four days (provided a plea is demanded). *Ibid*.

If the venue is laid in any other county, or the defendant lives above 20 miles from London, eight days. *Ibid*.

If entitled to an imparlance, to plead within the first four days of the next term, in all cases.

If plaintiff files common bail according to the statute and then declares, defendant has four days to plead, (if declaration be delivered four days before the end of the term in which the writ is returnable,) and the venue is laid in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be laid in the country, or the defendant lives above 20 miles from London, then eight days. *Vide Rule, Trin.* 22 Geo. 3.

On an order to amend.

If there be an order to amend, the defendant shall have two days exclusive, to alter his first plea, or plead a new.

Residence in Scotland arrest in London to plead in 4 days.

It appeared that defendant (whose usual residence was in Scotland) was arrested while casually in London, where

where he put in bail; the declaration was delivered to plead in *four days*, instead of *eight*: and on motion for an imparlance, *Lord Mansfield* said, no doubt but that it ought to be *four days only*; it should be deemed a residence in London where arrested. *Cutiff and another v. Gascoigne*, *Hil. 17 Geo. 3. 4 Term Rep. 553.*

Sunday is accounted a day, unless it be the *first* or *last* day. If rule expires on *Sunday*, defendant has all the *next day* to plead. *Str. 86. Anon.*

Sunday, or any day on which the court does *not sit*, is to be accounted as one of the four days, unless it happens to be the last. *N. on R. E. 5 Ann. T. 1 Geo. 2. A dies non*, says the master, we always treat in this court as a *Sunday*, and if it happens on the last day of a rule, &c. the party has the next day to plead, or do other act.

In *Richardson's Practice*, *Harrison's*, *Crompton's*, and the others printed subsequent, the same note is copied. And the notes on the rules have been printed upwards of 50 years; notwithstanding which, the common pleas, in *H. T. 1796*, where a rule to plead was given the 30th *Jan.*, and expired the 2d *Feb. (dies non)* held a judgment signed the 3d regular, and discharged the motion to set it aside, with costs, which amounted to 10l. but let in the defendant to plead on the merits only. *Measure v. Britten.*

Many instances, in this court, are to be met with, where the attornies have been misled by the ancient books of practice, to discharge the rule without costs.

It is presumed that all pleas are delivered in court, which occasioned those days to be excluded.

If he pleads in abatement, to plead in *four days inclusive* of both days, whether rule to plead be given or not. *Jennings v. Webb*, *1 Term Rep. 277. 690. Brandon v. Payne.*

If the last of the *four days* happen on a *Sunday*, the defendant may plead in abatement the *next day*. *Lee v. Carlton*, *3 Term Rep. 642.*

If the cause has been stayed four terms by injunction, no need of a *whole term's rule to plead.*

Sunday.

Sunday or a holiday.

Note as to C. P.

Abatement.

Demand of Plea.

When plea must
be demanded.

WHEN special or common bail is filed by the defendant, there must be a plea demanded in writing of defendant's attorney, before the plaintiff can sign judgment; although notice to plead be indorsed on the declaration, 1 *Wils.* 134. *Nott v. Oldfield*, and such demand must be delivered *twenty-four hours before judgment can be signed* by default. 1 *Black. Rep.* 50. 1 *Term Rep.* 454. *Dyche v. Burgoyne*. And if judgment signed before such demand made, it will be set aside with costs; so ruled in *E. T.* 1783.

A demand of plea cannot be made, until after the rule to plead be given. *Per Master Benton*.

Demand of plea.

The demand of a plea must be in writing, and is in this form: "*Doe v. Roe. The plaintiff demands a plea in this cause, by your's, &c. A. K. plaintiff's attorney:*" and to be delivered to, or left with, the defendant's attorney, or agent in town.

When not
necessary.

If a declaration be filed *de bene esse*, and notice given to the defendant thereof, in that case, if the defendant does *not* file common bail within *eight days*, and plaintiff files it for him according to the statute, there is no necessity to demand a plea before signing judgment.

Demand of plea,
waiver of bail.

The demand of plea is a waiver of bail; therefore before demand is made, take care that bail is justified.

Demand before
appearance.

A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. *Cook v. Raven*, 1 *Term Rep.* 635. *Venn v. Calvert*, 4 *Term Rep.* 578.

Prisoners.

In the case of a prisoner *in this court*, there must be a demand of plea; if he is in custody of the sheriff, no demand is necessary. *Rose v. Christfield*, 1 *Term Rep.* 591. *Mr. J. Buller*.

Per Cur. The rule is, that judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne*, 1 *Term Rep.* 454.

Court held, that, at all events, the plaintiff cannot sign judgment till the expiration of twenty-four hours after the demand of a plea. *Bowles v. Edwards*, 4 *Term Rep.* 118.

A declaration

A declaration of *Michaelmas* term delivered to plead *within four days of Hilary*. On *Saturday 28th Jan.* at six in the evening, a plea was demanded; and on *Monday* following, at 12, judgment was signed for want of plea, but at two, same day, defendant pleaded the general issue. The only question was, whether defendant had *till six o'clock on Monday to plead*, or *24 hours after plea demanded*, though that time expired on *Sunday*:—Court were of opinion, that defendant had *24 hours clear after the demand of the plea, exclusive of the whole of Sunday*. Rule absolute, for setting aside the judgment. 4 *Term Rep.* 557. *Solomons v. Freeman*.

If a plea be demanded on *Saturday*, 24 hours to plead after demand, exclusive of *Sunday*.

The demand of a plea on the back of a declaration is bad; it must be after declaration delivered and rule given. *Per Master Benton*.

Impar lance.

EMPARLANCE or *impar lance*, is a desire or petition in court of a day to consider, or advise, what answer the defendant shall make to the action of the plaintiff; and nothing else but the continuance of the cause till a further day. It seems to have arisen from a notion of religion mentioned in *St. Matthew, c. v. ver. 25.* in obedience to that precept in the Gospel, "*agree with thine adversary quickly, whilst thou art in the way with him.*" They looked upon the plaintiff at the time of declaring, to be in his way towards judgment; and therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give him time for that purpose; this impar lance was entered when the writ was general, because the defendant did not know how to agree with the plaintiff till he had heard his full demand; and therefore then the defendant might have agreed with him in the country, whilst he was in the way, according to the letter in the text, in which case there was no need of a *libertas loquendi* to be entered upon the roll. And it may be observed that this Gospel precept has a plain reference to the *Roman* law of the Twelve Tables, which expressly directed the plaintiff

Definition.

plaintiff and defendant to make up the matter whilst they were in the way, or going to the prætor; *in viam rem uti pacunt orato.*

Imparlance is said to be when the court gives the party leave to answer at another time, without the assent of the other party. *Com. Dig. title Pleader, (D. 1).* But the more common signification of imparlance, is time to plead, *2 Show. 310. 2 Mod. 62.*; and it is either *general* without saving to the defendant any exception, which is always to another term, *Mod. 28.*; or *special*, which is sometimes to another day in the same term, *6 Mod. 8.* with a saving of all exceptions to the writ, bill, or count; or of all exceptions whatsoever: which latter is called a general imparlance. The *general imparlance* is of course where the defendant is not bound to plead the same term; but a *special imparlance* is not allowed, without leave of the court. After a *general special imparlance*, the defendant may not only plead in abatement of the writ, bill, or count, but also privilege. *1 Lev. 54. 12 Mod. 529. 5 Mod. 335.* But I take it that such plea must be entitled of the term the declaration is filed.

Formerly the mode of craving a *special imparlance* was to pay the plaintiff's attorney 2s., which he used to do with a *salvo of all exceptions, tam ad breve*, (if by original,) *quam ad narrationem*; and then the defendant pleaded in abatement. *Sty. Prac. Reg. 396.* In the common pleas the prothonotary is paid 2s. for the entry, *Vide 3 Lev. 53.* of the *special imparlance*. But now by rule of *E. 5 Ann. It is ordered*, that a special imparlance shall not be allowed the defendant, without leave of this court first obtained.

Generally, if a writ be returnable the *last* return of the term, and plaintiff declares (even in aailable action) *before the essoign day of the next term*, the defendant is entitled to an imparlance of course.

If the writ be returnable *before the last return of any term*, and the declaration *not filed*, and *notice given four days exclusive before the end of such term*, the defendant is entitled to an imparlance. *R. Trin. 22 Geo. 3.*

Writ returnable the *last day of Trinity term*, on which day, the bail were put in, but did not justify until 9th Nov. following, and no declaration *de bene esse* having been delivered before the essoign day of this term; motion for time to plead till next term; and

No special imparlance without leave.

When entitled to an imparlance.

If bail not perfected may declare without imparlance.

1 *Crompt.* 130. was relied on. The court said he was not entitled to an imparlance. *Buller, J.* No laches can be imputed to the plaintiff for not declaring until the defendant is perfectly in court. The case cited happened in the common pleas; and that many of the cases published in *Crompt. Pract.* were hastily collected by himself, *before he was at the bar*, were never intended by him for publication, and were too loose to be relied on. Rule refused. *Rolleston v. Scott*, 5 *Term Rep.* 372.

On a declaration delivered of *Hilary*, there may be an imparlance to *Trinity* term, if defendant has not pleaded before; for it is the course of the court to give imparlance or declaration till the day of pleading. If a writ be returnable in one term, and the declaration is not delivered *before* the *essoign* day of the *second* term, the defendant is not obliged to plead in the *same* term, but is entitled to an imparlance (*except where bail is not perfected*).

Court refused to grant an imparlance, where the cause was removed by *habeas corpus*. It was removed the 6th of *November*, and declaration delivered the 12th. *Wood v. Wenman*, 1 *Wils.* 154. *Salk.* 515.

Motion for an imparlance, the declaration had been delivered to plead in *four days*, instead of *eight*. It appeared that the defendant (whose usual residence was in *Scotland*) was arrested while *casually* in *London*, where he put in bail.—The question was, whether the rule *M. 10 Geo. 2.* ordering, that *where defendant resides above 20 miles from London, he must have eight days times to plead.* *Buller* shewed cause, and insisted, that such rule of court extended only to persons residing in *England*, otherwise it might be contended that it extended to *Italy* as to *Scotland*. *Lord Mansfield*. No doubt but that it ought to be *four days only*; it should be deemed a residence in *London*, where arrested. Rule discharged. *Cutiff and another v. Gascoigne*, *Hil.* 17 *Geo. 3.* 4 *Term Rep.* 553.

An imparlance seems discretionary in the judge *on amendment*, unless the plaintiff pays costs. So if the plaintiff keeps any deed, &c. which belongs to defendant, whereby he is to make his defence, and will not deliver it, for the law gives convenient time to make his best defence.

Declaration of *Hilary*, imparlance to *Trinity*.

Writ returnable one term, declaration not delivered before *essoign* of the next, imparlance.

Refused.

Arrest in *London*, residence in *Scotland*, must plead in 4 days.

Imparlance discretionary.

If

As to amend-
ment;

If the amendment be matter of form, it seems no imparlance; if in substance, costs must be paid, or imparlance. *N. on R. M. 10 Geo. 2.*

Within what Time Defendant is to plead where there have been no Proceedings for four Terms, in Law or Equity.

How to proceed
if four terms are
elapsed.

If four terms are elapsed, after the declaration is delivered, the defendant shall have a *whole* term's notice to plead, before judgment can be entered against him, unless the cause has been stayed by injunction or privilege. *N. on R. Tr. 5 & 6 Geo. 2.* In this case you give notice to defendant, or his attorney, *before the effoign day of the term*, that you intend to proceed after the next term, "*by giving a rule to plead.*" The like rule to reply, rejoin, &c.

Notice of inten-
tion to proceed
delivered two
days before Hil.
term. Rule to
plead 14th Feb.
and judgment
signed for want
thereof 18th
April, held re-
gular.

Two days before *Hilary term*, plaintiff gave notice of his intentions to proceed; on the 14th of February, two days after *Hilary term*, the rule to plead was given, and on the 18th of April, in the course of the same vacation, the plaintiff signed judgment for want of a plea, which was moved to be set aside for irregularity; and it was contended, that defendant ought to have had the term and vacation, as also until the four first days in *Easter term*, to have pleaded, for that no rule to plead could be given in the vacation; and if the vacation as well as the term were not meant to be included by the rule, the judgment had been signed too soon, for it appears to be signed of *Hilary term*, so that there was not even a term's notice: On the contrary, it was insisted, that according to the practice of the court, the judgment was regular, for that the rule did not extend beyond the term; and though the judgment appeared to be signed of *Hilary term*, the defendant had in fact the benefit of the rule for a whole term. The court were of that opinion, adding, that the judgment would appear to be regular on the record, though signed as of *Hilary term*; for the rule requiring a term's notice, where no proceedings have been had in the cause, was only a rule of court introduced for the benefit of the party, the full benefit of which, the defendant had had in this instance. *Milbourn v. Nixon and others*, 2 Term Rep. 40.

Give

Give the rule the day after the last day of the term, and demand plea; if no plea, sign judgment after the four days are expired, exclusive.

Searching for Plea.

TO be searched for at the clerk of the papers in *Symond's Inn*, who keeps two books by the plaintiff's name; if you find no plea there, search with the clerk of the judgments, at the *King's Bench* office, who keeps the *general issue book*; and if there is no plea, sign judgment; the form of which see under title *Judgment by Default*.

Although the plaintiff be entitled to judgment, yet if he delays signing it, the defendant may put in his plea, although the time be expired by the rules of the court, and such plea will be accepted, for a judgment upon a *nil dicit* is for want of a plea; and if the plaintiff signs judgment after, the court will set it aside for irregularity. *Minns v. Baxter*, 1 Term Rep. 17. Lill. Pract. Reg. 373.

If delay be made when entitled to sign judgment, defendant pleads it is good.

Pleas in Abatement.

When to be pleaded.

A PLEA in abatement cannot be pleaded *before the defendant appears*, because he does not answer to the process of the court, which formerly was returned and read at the bar. If he appeared, the *countor* read the writ to the court in his presence, and he was to plead in *four days*, unless special leave was given by the court; because the person coming in by the process of the court, ought not to have time to delay the plaintiff. *Gilb. C. P.* 52.

And before such plea be pleaded, (which is to be filed,) the declaration must be taken out of the office, or the plaintiff may sign judgment. *N. on R. T. 12 W. 3. M. 10 Geo. 2. Reg. 3.* The plea ought to be filed and not delivered. 1 Term Rep. 278. *Harbord v. Perigal*.

Pleas

Vide title *Impar-*
lance. Vide
title *Rule to*
Plead.

Pleas to the *jurisdiction* of the court, or in abatement, ought to be pleaded before the *rule for pleading is out*, and cannot be pleaded after a common imparlance, or unless the declaration be delivered after term, or so late in the term, that the defendant is not bound to plead to it that term; in both which cases, the defendant may, within the *first four days inclusive* of the next term, plead any plea in abatement, or to the jurisdiction of the court (intitling it, as of the *preceding* term); but if such plea be not delivered, or left in the office in time (whether a rule to plead be given or not), such plea is not to be received. *N. on R. E. 5 Ann. Vide Comberb. 251.*

Pleas in *abatement* must be pleaded in four days, if declaration be delivered *before the last four days in term.* *Long v. Miller, 1 Wils. 23.*

Sunday.

Sunday, or any day in which the court do *not* sit, is to be accounted as one of the *four days*, unless it happens to be the last day. *Ibid.* In that case, the plea may be filed on the *Monday*; otherwise as no plea can be filed on the *Sunday*, the time would be limited to three days in such cases. *Lee v. Carlton, 3 Term Rep. 642. Per Buller, J.*

And a plea in abatement may be pleaded by attorney. *1 Ld. Ray. 509.* but not to the jurisdiction. *Gilb. C. P. 187.*

Four days to
plead in abate-
ment are, both
inclusive.

Declaration was delivered the 16th *May*, and the 20th the plea in abatement was filed. Plaintiff signed his judgment, alledging it ought to have been filed the 19th. *Court:* All pleas to the jurisdiction and in abatement, being dilatory, ought not to be favored; and that the *four days* allowed for pleading them are both to be *reckoned inclusive.* Rule, why the judgment should not be set aside, discharged. But the defendant had leave to plead the general issue on the payment of costs. *Jennings v. Webb, 1 Term Rep. 277.*

Leave to plead
the general issue.

What shall be a
special impar-
lance in pleading
misnomer in
abatement.

The defendant pleaded a misnomer in abatement, which was after an imparlance, thus: *At which day came Ham John Crapper* (the defendant's true name), *who is sued by the name of John Capper, &c.* to which the plaintiff demurred; and objected, that this plea in *abatement* ought to have been pleaded of the same term with the declaration, or after a *special imparlance*, and that
this

this is after a *general imparlance*. But *per Curiam*, This imparlance, by the true name is *special* for this purpose; but if he had said *venit prædict. John Capper*, it had been bad, for that would have confessed that *John Capper* was the true name. *Kelw. 93. b. Judgment for defendant. Brewster v. Capper, 1 Wils. 261.*

The declaration was delivered as of *Trinity term*, before the *essoign day* of *Michaelmas*, with the usual notice to plead within the first four days of the latter term, within which time the defendant filed this plea, *And Lascelles Lascelles, who is sued by the name of Sturdy Lascelles, in his proper person comes and pleads that he was baptized by the name of Lascelles, &c.* without this, that he ever was called or known by the name of *Sturdy, &c.* The plaintiff considering this plea as delivered out of time, signed judgment. Motion to set it aside. *Brewster v. Capper* was cited. *Sed per Cur.* Such a plea as this can only be received after a *special imparlance*, which should be stated on the record, but that not appearing here, the plaintiff was entitled to sign judgment. Rule discharged. *Doughty v. Lascelles, 4 Term Rep. 520.*

Writ returnable 6th *February* 1787, declaration filed the 7th, and a rule to plead given same day: But notice was not delivered till the 8th, and the plea filed the 15th in abatement; plaintiff signed judgment the 16th. Rule to set it aside for irregularity. It was contended, that the rule to plead being given before notice of declaration served, was irregular; but the court said, the party may undoubtedly *dispense with the rule to plead*. And here the defendant has superseded the necessity of a rule to plead, by pleading in abatement. Rule discharged. *Brandon v. Payne, 1 Term Rep. 690.*

Declaration filed Wednesday the 17th Feb. 1793.— The 21st was on a *Sunday*, and on 22d defendant filed a plea in abatement; plaintiff signed judgment, which the court held regular; the four days are reckoned *inclusively*, the time expired on the *Saturday*. *Harbord v. Perigal, 5 Term Rep. 210.*

In a special action on the case, upon the custom, against a carrier, for not delivering goods, after a general imparlance to *Easter term*; the defendant pleaded in abatement, that several others were his partners, and that the goods were delivered and received by

If plea in abatement be irregular judgment may be signed.

If the defendant plead in abatement, he dispenses with the rule.

The 4 days are inclusive.

After a general imparlance, a plea in abatement is bad, and may be demurred to. Action against a carrier he may plead partnership in abatement.

by him and his partners jointly, and not by him solely, and that they were living;—To which there was a general demurrer:—*Court* held, that the plea was bad, because pleaded *after a general imparlance*, but that it might have been supported if it had been pleaded in proper time; and *Lord Kenyon* said, the declaration upon the custom of the realm is the same in effect with the present (which was, that he undertook, in consideration of so much money, to carry the goods from one port to another). In the old forms it is, that defendant *suscepit*, &c. which shews that it is *ex contractu*. *Buddle v. Willson*, 6 *Term Rep.* 369. *Salk.* 440. *Skin.* 278. *Carth.* 58. 3 *Lev.* 258. *Vide* 5 *Term Rep.* 649, which was action for negligence in managing a ship; it was held, defendant could not plead that there were other partners not named. *Michell v. Tarbutt*, where the cause of action arises *ex delicto*, plaintiff may sue all or any of the parties; upon each, a separate trespass attaches.

As to jurisdiction.

In every plea to the jurisdiction, another jurisdiction must be stated. *Mostyn v. Fabrigas*, *Cowp. Rep.* 172. They must be pleaded in person. *Gilb. C. P.* 187.

Rules laid down for pleading in abatement.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them: 1st, by 4 & 5 *Ann. c. 16*: “No dilatory plea shall be received, unless the party by affidavit, prove the truth thereof, or shew some probable matter to induce the court to believe that it is true.” 2d, That no plea in abatement shall be received after a *respondeas ouster*, for then they would be in infinitum. 2 *Saund.* 41. 3d, That they are to be pleaded before *imparlance*, except where the declaration is delivered too late. 4th, That when issue is joined on them, if found against the defendant, the judgment shall be peremptory. 2 *Show.* 42. 6 *Mod.* 326. 2 *Wils.* 367. *Eichorne v. Le Maitre*. And therefore the jury ought to assess the damages, and the judgment shall be *quod recuperet*, because the defendant chusing to put the whole weight of his cause upon this issue, where he might have had a plea in chief, is an admittance that he had no other defence. 10 *Mod.* 112. *Str.* 532. An affidavit is necessary wherever you plead to the jurisdiction. 2 *Lord Raym.* 1418.

No advantage can be taken of declaration.

On a plea in abatement no advantage can be taken of the errors in the declaration; for nothing but the

writ

writ is then in question, and nothing else is pleaded to. *Carth.* 172. 3 *Lev.* 351.

If a defendant has forfeited his bail-bond, and proceedings be stayed at his request, he cannot afterwards plead in abatement to the original action, but must plead in chief. *Salk.* 519.

Cannot plead in abatement if proceedings be stayed on bond.

And the court will refuse to order a bail-bond to be cancelled on an affidavit of defendant, that he was *not the person*; but will leave him to plead in abatement. As where the action was, *Salter qui tam v. Sherfold*, defendant entered into the bail-bond by the name of *Williams*, which was his right name, then moved to have the bond cancelled as above, which was denied. 3 *Term Rep.* 572.

Court will not order bond to be cancelled if defendant be taken by wrong name.

On a *respondeas ouster*, no notice need be given of it, for the defendant is supposed to be attending his cause to maintain his plea. *Salk.* 7.

In pleas in abatement which relate to the person, there is no necessity of laying a *venue*, for all such pleas are to be tried where the action is laid. *Salk.* 4. pl. 14. *Carth.* 363. 12 *Mod.* 125. 195.

No need to lay a venue.

If the defendant omits to plead a *misnomer* in his right name, he may be taken in execution by his *wrong name*. *Str.* 1218. *Crawford v. Satchell*.

A defendant cannot plead two dilatory pleas, nor will the court suffer a plea in abatement to be amended.

Cannot plead two dilatory pleas.

A plea in abatement must be signed by counsel, and filed with the clerk of the papers; and without an affidavit annexed to it, judgment may be signed.

A plea in abatement must be signed.

If the defendant plead in abatement of his *Surname*, or *Christian name*, the plaintiff may have a summons to amend his declaration, upon payment of costs, which saves the entry of a *causetur billæ*: but if the plaintiff thinks proper to enter up a *causetur billæ*, then it is to be done thus: get a roll, enter a memorandum of the term the declaration is delivered, and the plea at the foot thereof; (then say) And thereupon the said *T. W.* says, that he cannot deny the said exception of the said *J. R.* above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said lord the king, before the king himself, that the said bill of the said *T. W.* be quashed, &c.

May amend.

How to enter a causetur billæ.

Judgment of causetur billæ.

The roll is to be taken to the clerk of the judgments and docketed, pay 4d. *per* sheet, and the master marks *the cassetur billæ thereon*, when the entries are paid for; it is filed with the clerk of the treasury; then proceed a-new.

If plea be correct, court must receive it, but if inaccurate cannot be supported.

The court cannot hold *too strict* a hand over these sort of pleadings, which are calculated to defeat the justice of the case; if the plea be drawn *correctly*, the court cannot deprive the defendant of the benefit of it. But if there be the *least inaccuracy* in it, it cannot be supported. *Roberts v. Moon*, 5 Term Rep. 488.

Oyer.

Oyer of a deed, &c. if demanded by the defendant, must be given.

OYER of a deed, is where a man brings an action upon a deed, bond, or other instrument, and the defendant appears and prays that the same may be read to him; and after *oyer* is demanded of the plaintiff's attorney, the defendant is not bound to plead, until he hath a copy, and the original shewn him at the time, he paying for such copy; and such copy is allowed to him, to consider what he is to plead to the action.

So to the plaintiff.

So if the defendant in his plea makes a *profert in curia* of any deed, &c. the plaintiff may make the like demand of *oyer*, and have a copy delivered to him, paying for it.

The party is bound to carry it.

As *oyer* of deeds is demandable by either party, the party of whom the *oyer* is demanded, is bound to carry it to the adverse party. 2 Term Rep. 40.

Letters of administration.

So if plaintiff sets forth letters of administration, the defendant may pray *oyer*. 2 Wils. 413.

Oyer of original writ disallowed.

Formerly the practice was to demand *oyer* of the original writ, before plea, and he was entitled to it. But Lord Mansfield said, that such demand was used merely for delay, and was not warranted by any rule or principle of justice. For it was incumbent on the court to make their proceedings as *little dilatory, oppressive, and expensive* as possible; that it was unnecessary for the defendant to see the original, after he had been informed of the cause of action by the declaration. That the court of common pleas had rejected the practice; and that from thenceforth plaintiffs might

might proceed as if such demand of oyer had not been made. *Boats v. Edwards*, Dougl. 228.

Variance between the original writ, and declaration is fatal, and may be taken advantage of by a writ of error. Formerly it might have been by *craving oyer* of the original writ, but now defendant shall not have oyer of the writ for the purpose of setting aside the proceedings. *Spalding et al. v. Mure et al.* 6 Term Rep. 363.

Variance between original and declaration fatal.

There are cases in which the *profert* may be dispensed with, *vide* 3 Term Rep. 151.; and if a *profert* is made by mistake, the court will give leave to amend, and let the party in to plead according to the fact. *Ibid.* 153. *contra.* 2 Str. 1126. 1 Wils. 26.

Profert may be dispensed with.

When to be demanded of Plaintiff.

The demand of oyer is a kind of plea, and should regularly be made *before the time for pleading is expired*. *Rex v. Amery*, 2 Term Rep. 150. In this court, oyer may now be made after an imparlance. 12 Mod. 99. *Ld. Ray.* 970. 2 Lev. 142.; and I think, *after a judge's order obtained, previous to the expiration*.

When to be demanded.

The party demanding oyer must pay for a copy, at the rate of 4d. per sheet; and if the defendant craves oyer of any thing whereof he is entitled to oyer, and it is not delivered in time, he shall have so many days after the rule is out, as he demanded oyer before the rule is out. *Powell v. Gay*, Str. 705. So the plaintiff shall have the same time to reply as he had at the time of demanding oyer. *N. on R. T. 5 & 6 Geo. 2.*

Party demanding oyer must pay for a copy.

Antiently oyer was demanded in court, but now it is made by one attorney, of the other. *Mod. Caf.* 28.

Formerly demanded in court.

No one is entitled to oyer of a record. *Rex v. Amery*, 1 Term Rep. 150.

Record.

Upon oyer, the party is entitled to a copy of the whole deed, witnesses' names, and all memorandums subscribed, and indorsed upon it. *Vide Barn.* 263. So of the bond, and condition.

Copy of the whole deed, &c.

There is no settled time for the plaintiff to give oyer, because it is in his own delay; as the defendant has the same time to plead after oyer given, as he had at the time of demanding it. And he may either set forth the oyer in his plea or not, at his election. 2 Str. 1241. *Weavers' Co. v. Forest.* *Ld. Ray.* 969. *Carth.* 301.

No time fixed for plaintiff to give oyer.

The defendant has two days to give plaintiff oyer exclusive.

To an action of trespass, the defendant pleaded a justification on a deed, which he set out, that on *Friday* evening, plaintiff demanded oyer and copy, which not being complied with on the *Monday* following, he signed judgment: Motion to set it aside. *Aspburst, J.* The defendant has *two days* in which to give oyer and copy of the deed, which are reckoned *exclusive*; and the party of whom oyer is demanded, must carry it to the opposite party. In the present case, the judgment was signed *before* the expiration of the *two days*, and therefore irregular. *Page v. Divine and others, 2 Term Rep. 40*

Sunday last day.

Sunday in this case was the *last day*, therefore he had the whole of *Monday* to deliver oyer.

If oyer of any instrument is granted.

If oyer is granted of any instrument of record, and is set forth, although the party could not have insisted on such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. *Jesfery v. White, Dougl. 477.*

If proferet unnecessarily made.

If proferet be made unnecessarily, oyer shall not be given. *Salk. 497.*

If defendant be party to the deed.

Where defendant is party to an indenture himself, he ought not to demand oyer, but set it forth himself; and if he demands oyer, and plaintiff gives it him imperfectly, it is at defendant's peril. *Salk. 498.*

Or deed in hands of third person.

Where the bond or deed is in the hands of a *third* person, the court on motion will oblige him to give oyer and produce it. *Str. 1198. Sid. 50.* So if it be in the hands of the defendant, when he can have no pretence to it. *3 Term Rep. 153. in notes, Matison v. Atkinson.*

The demand of oyer is as follows:

Demand.

Doe v. Roe—The defendant demands oyer and copy of the (indenture of lease, or articles of agreement, &c.) in the declaration mentioned. Or (if the action be upon bond, say, of the writing obligatory and the condition thereof mentioned in the declaration). Yours, &c. C. D. defendant's attorney. Direct it to plaintiff's attorney.

Oyer of deed in plea.

The plaintiff demands oyer and copy of the deed in the plea mentioned in this cause.

Need not be on stamp.

The oyer need not be ingrossed on stamp paper. The master says judgment cannot be signed for want of payment of oyer.

It is said, if *oyer* be not made in due time, i. e. *after the time for pleading expired*, the plaintiff may consider the demand as a nullity, and sign judgment. *Tidd* 347. cites *Fowler v. Dyer*, *M.* 20 *Geo.* 3. This is in case time is not obtained. *Oyer* is not demandable of an act of parliament. *Dougl.* 476.

If *oyer* is demanded after the time expired.

Barn. 326.

If the plaintiff demand *oyer* of the deed mentioned in the plea, and it is not given him in due time, he may sign judgment as for want of a plea. *6 Mod.* 122. Although the defendant is not bound to set forth the *oyer* in his plea, yet plaintiff may pray an inrolment, and so make it part of his replication.

Oyer of defendant.

If a judgment or other matter of record in the same court be pleaded, the party pleading it must, *on demand*, give a note in writing of the term and number roll, wherein such judgment or other matter of record is entered and filed, or in default thereof, the plea is not to be received. *N. on R. T.* 5 & 6 *Geo.* 2. *Carth.* 454. 1 *Ld. Ray.* 347. 550. 2 *Str.* 823. which states, that *court makes a rule to reject the plea*, unless the term and number roll is given. *Hunter v. Wiseman*. But if he plead a judgment recovered in a different court, the plaintiff must reply *nul tiel record*.

If a judgment or other matter of record in same court be pleaded.

If of another court.

If defendant demands *oyer* of an obligation, he shall not have *oyer* of the condition, unless he demands that also. *6 Mod. Cas.* 237.

If *oyer* of bond only.

But if he demands *oyer* of an indenture, which refers to matter indorsed, it is not a complete *oyer*, if he has not *oyer* of the indorsement also. *Ibid.*

If of an indenture.

May have *oyer* of a policy of insurance. *Rep. temp. Hard.* 243. 1 *Sid.* 386.

Policy of insurance.

If declaration be on bond for performance of covenants, cannot demand *oyer* of the indenture, *Salk.* 498. but I think otherwise *if the condition refers to the indenture*.

If of bond for performance of covenants.

The defendant in an action of debt on bond, after craving *oyer* of the bond and condition, set out in her plea the *condition*, omitting the reciting part preceding it. Motion to quash the plea:—*Court.* By craving *oyer*, the defendant undertook to set out in her plea the *whole condition*, including the recital in so many words; and that not having done so, the plea was bad. That the plaintiff would have been warranted in signing judgment, as for want of a plea; and that though in this case, no time was gained by the defendant's attempt,

If the whole of the condition of bond, with recitals, be not set out after *oyer*, plaintiff may sign judgment, or court will quash plea.

yet in most cases a false recital was made for the purpose of delay ; and made rule absolute ; refused also to let the defendant amend. *Wallace v. Duke of Cumberland*, 4 Term Rep. 370. No trial had been lost.

If bond after oyer be set out truly, and book made up, and rule to abide by the plea be given, and defendant plead anew with a false condition, court will order plaintiff to sign judgment and attach the attorney.

To debt on bond, after oyer, defendant set it out in plea truly, pleaded payment by the principal, he being a surety : plaintiff replied, and put the pleas in issue, and then served defendant's attorney with a rule to abide by his pleas, and gave notice of trial : The defendant returned the paper book, setting out a *false oyer of the bond* and pleading as before, on which the plaintiffs *inrolled the true condition*, and demurred. On the day of argument, which was the last paper day of the term, the defendant's counsel objected to its being argued, because it was the last paper day. The court, on hearing the above fact stated, directed an affidavit of them to be made, and made a rule *nisi* for striking out all the pleadings of defendant, that the plaintiff should have judgment, and that the defendant's attorney should pay all the costs, and were inclined to grant an attachment against him. *Ferguson v. Mackreth*, H. 24 Geo. 3. 4 Term Rep. 371.

Pleading in Bar.

General issue how pleaded.

IT has been already stated, that pleas in bar are of two sorts, *general*, and *special*; the *general issue*, is either to be ingrossed in form on a treble penny paper, and delivered over to the plaintiff's attorney within the time allowed by the rules of T. 1 Geo. 2. and 22 Geo. 3. before stated in p. 203 and p. 204, or it is to be entered in the *general issue book*, with the clerk of the judgments, who takes 6d.

The several general issues.

Vide p. 43.

The general issues are as follow :—In an action in *assumpsit*, *non assumpsit* ; in debt, on simple contract *nil debet* ; in debt on specialty, *non est factum* ; in debt on record *nul tiel record* ; in detinue *non detinet* ; and in trespass *vi et armis*, and trespass on the case for wrongs done, *not guilty*. And where the *general issue* may, it ought in general to be pleaded, it being cause of demurrer, that the plea amounts to the general issue ; and where the defence consists of *matter of law*, the defendant may either plead it *specially*, or give it in evidence under the *general issue* ; as in *assumpsit*, *infancy*,

fancy, may be either pleaded or given in evidence on *non assumpsit*; and in debt on bond, the defendant may either plead *coverture*, or give it in evidence on *non est factum*.

In *qui tam* actions, and actions on penal statutes, the plea is not guilty, but a former recovery must be pleaded.

Upon the general issue in *assumpsit*, the question is, whether there was a subsisting debt, or cause of action at the time of commencing the suit. But matter of law, in avoidance of the contract, or discharge of the action, are usually pleaded.

No general issue need a counsel's hand, nor need the following pleas: *bankruptcy*, 6 Term Rep. 196. *compensat ad diem* to a bail-bond, *son assault demesne, plene administravit* by an executor or administrator, *riens per discent*, *nul tiel record*, *per minas*, *solvit ad diem*, *ne unques executor*, *infra ætatem*, *Cooke's case* 41. to be delivered to plaintiff's attorney, ingrossed on a treble penny paper; nor must these pleas be entered in the general issue book.

But if either of these pleas are replied to specially, and signed by counsel, the replication should be filed with the clerk of the papers, who is to make up the paper book on a copy of the plea and declaration being delivered to him.

Before plea can be pleaded, *bail must be perfected*, for though it is filed previous to the perfecting bail, it does not make it a good plea, for the defendant is not in court till the bail are perfected, and if such plea is filed or delivered before the bail are perfected, the plaintiff may sign judgment. *Venn v. Calvert*, 4 Term Rep. 578. Vide *Cooke v. Raven*, 1 Term Rep. 635.

Also before plea filed or delivered, the declaration must be taken out of the office, or plaintiff may sign judgment.

Pleading specially.

All special pleas must be signed by counsel or a serjeant, (except those before mentioned,) and if such special plea be single, ingross same on a treble penny stamp paper, put counsel's name at the foot, and file it with the clerk of the papers.

It is ordered, that no special pleas or demurrers in law shall be received by the clerk of the papers, before such pleas or demurrer in law shall be signed with the

Qui tam actions.

On general issue in *assumpsit*, what is the question.

General issues need no counsel's hand, nor these pleas.

But if the latter are specially replied to.

If plea be filed before perfected, it is a nullity.

Declaration must be taken out of office before plea filed, &c.

Clerk of the papers to receive no special pleas

or demurrers
before signed.

proper hand of some counsel in that behalf retained. R. T. 18 Car. 2.

No attorney to
deliver any plea
that ought to be
filed or received.

Ordered, that no attorney or clerk presume to deliver to any other attorney or clerk, or to any other person, or receive from any attorney or clerk, or any other person, any special plea to be put into the office of the clerk of the papers, or a copy of such plea, before that such plea shall be put into the office of the clerk of the papers; and that such copy, after such plea be put in, shall be made by the clerk attending in the office of clerk of the papers, and signed under the hand of one of the clerks attending there. *R. M. 2 W. & M.*

Where a special
plea was not
filed, and plain-
tiff replied, he
made up issue
and paid clerk
of the papers,
held good.

Non assumpsit and statute of limitations pleaded, which was delivered, plaintiff replied, and made up the issue, defendant's attorney paid for it; the plaintiff's attorney, finding the book ought to have been made up by the clerk of the papers, paid him his fees and proceeded to trial; no defence was made, and court held that defendant was in first fault in filing his pleas. *Thomson v. Tiller, 2 Str. 1166.*

If the writ be against two, and *both* served *before the return*, one does not appear in the *same term*; yet the court will make him plead *as of the term when he ought to have appeared.* *Smith v. Muller, 3 Term Rep. 627.*

Of pleading two or more Pleas in Term.

May plead as
many pleas as
are necessary.

Any defendant in any action, or any plaintiff in replevin, in any court of record, with leave of the same court, may plead as many several matters as he shall think necessary for his defence; provided that if any such matter shall, on demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for plaintiff, costs shall be also given, in like manner; unless the judge, who tried the said issue, shall certify, that the said defendant, or plaintiff in replevin, had a *probable cause* to plead such matter, which upon the said issue shall be found against him. Provided, that nothing shall extend to any writ, declaration, or appeal of felony, &c. or to any writ, bill, action, or information upon any penal statute.

Certificate.

How to proceed
after plea is

After the plea is drawn and signed by counsel, give him a brief *to move to plead the several matters specified,* which

which he signs of course ; see 10s. 6d. If you are in time, take the plea and brief to the clerk of the rules, who will draw up rule, pay 1s. 4d. *per sheet*, annex the copy to the plea which is to be ingrossed on a treble penny paper, then file same with the clerk of the papers. But sometimes it so happens, that there is *not* time sufficient to get the rule drawn up ; in that case, leave the plea and brief at the clerk of the rules, who will draw it up, copy same, and serve it on plaintiff's attorney immediately.

drawn and signed.

But if such plea and brief *be not left before plea filed*, plaintiff may sign judgment, for want of a plea.

If rule is neglected.

This court never refuse leave to plead several matters, provided the pleas be not *inconsistent*, and liable to make an incongruity on the record, as *non est factum*, and a *tender* to part, *Jenkins v. Edwards*, 5 Term Rep. 98. ; or *non assumpsit* to the whole, and *tender to part*, *Maclellan v. Howard*, 4 Term Rep. 194. because, if the general issue be found for the defendant, it will then appear on the record, that no debt is due, and yet that the defendant admits something to be due.

If pleas be inconsistent, may not be pleaded.

The stat. 4 Ann. c. 19. does not extend to actions on penal statutes ; therefore to a penal action the defendant pleaded, 1. the general issue ; and 2. a prosecution, and acquittal for same offence before a justice ; the court granted a rule for defendant to elect on which of the pleas he meant to rely, and to set aside the other plea. *Heyrick v. Foster*, 4 Term Rep. 701. Str. 1044. 2 Wils. 21. Barn. 365.

In penal actions, one plea.

The certificate of probable cause for the special plea is not required to be made in court at the trial of the cause ; and where the judge refuses to grant it, the court have not a discretionary power, whether they will allow the defendant any costs at all ; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion. 2 T. Rep. 237. 394.

Certificate of judge of plea need not be made in court.

If pleaded in Vacation.

A summons must be obtained to plead several matters, serve copy, the judge, on stating the pleas, will make an order for the clerk of the rules to be at liberty to draw up a rule on producing counsel's hand to the motion paper, which obtain, and then take the plea and motion paper with the order, to the clerk of the rules,

The plea of *solvit ad diem* cannot be entered in the general issue book, but if entered, it operates as a waiver of imparlance, and plaintiff may sign judgment as for want of a plea.

rules, who will draw up the rule, serve copy, or annex it to the plea as before.

The defendant entered in the general issue book, "*the defendant pleads the general issue of solvit ad diem,*" plaintiff signed judgment, and issued execution. *Motion to set aside the judgment, and the fi. fa. executed.* The defendant was a member of parliament, he neglected to appear till after *distringas* issued; he appeared 30th *May*, three days before the end of *Easter* term, declaration delivered same day, *to plead in four days*, and gave rule to plead; on 31st, a plea was demanded; on 3d *June*, defendant demanded *oyer* and copy of the bond, which was given the 4th; on 5th, he entered the plea; 14th, plaintiff signed judgment.—Two points were insisted on, 1st, that defendant was entitled to an imparlance; 2d, that his plea was regular. *Court*—The judgment is regular, the plea concluding with a verification, could not be entered in the general issue book; but that though it were not good as a plea, because improperly entered, it operated as a waiver of the defendant's right to imparl; like the common case, where a defendant puts in an improper plea in abatement, which, though not a good plea in abatement, supercedes the necessity of a rule to plead. And that this being a matter of practice, however doubtful the reason on which it was founded might be, it ought now to obtain, the master certifying this to be the uniform practice of the court. *Rule discharged.* *Lockhart v. Mackreth*, 5 *Term Rep.* 661.

Amendment.

Of amending Declarations, and other Pleadings.

FORMERLY the suitors were much perplexed by writs of errors, brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of clerks, all which might be amended *at the common law*, whilst all the proceedings were in paper. 1 *Burr.* 322. For they were then considered only *in feri*, and therefore subject only to the control of the courts; but when once the record was made up, it was formerly held, that

that by the common law no amendment could be permitted, unless *within the very term* in which the judicial act so recorded was done; for, *during the term*, the record is in the breast of the court; but afterwards it admitted of no alteration. *Co. Lit.* 260. Now the courts are more liberal, and, *where justice requires it*, will allow of amendments *at any time whilst the suit is depending, notwithstanding the record be made up, and the term past*; and the court will always take care that if one party obtains leave to amend, the other will not be prejudiced nor delayed thereby. *2 Burr.* 756. *Alder v. Chip.*

The statutes are *14 Ed. 3. c. 6. 8 H. 6. c. 12. & c. 15.* the purport of which is, that the judges may amend in any *record, process, word, plea, warrant of attorney, writ, panel, or return, all that which seems to them to be the misprision of the clerk (except appeals, &c. and outlawries of the same).*

All the other statutes, which are more extensive in their nature, are held to be statutes of *jeofail*.

The statutes of amendment only extend to pleadings of *record*; so that when the proceedings are *plainly upon record*, and are known to be so by the court, no amendment therein can be made (except *such* as are warranted by the statutes of amendments).

Amendments upon informations are so much a matter of course, that they are even made on application to the judges at chambers; the defendant is not concluded by a bad demurrer, but may afterwards be tried on the merits, and therefore, after a demurrer to an information against an *East Indian* delinquent, under the stat. *24 & 26 Geo. 3. c. 57.* the court suffered the information to be amended. *Rex v. Holland, 4 Term Rep.* 457. But if amendment after amendment were to be applied for, to harass the defendant, perhaps *the court* would refuse to lend their aid any longer.

Amendment on informations.

In order to amend upon these statutes, it is a general rule, that there must be something to amend by, as the declaration by the bill, *2 Str.* 954. the pleadings subsequent, by the paper book, *2 Ld. Ray.* 895. or draft under counsel's hand, *2 Str.* 846. the verdict by the plea roll, *1 Ld. Ray.* 133. the judgment by the verdict, *3 Term Rep.* 349. the execution by the judgment, *Say. Rep.* 12. *2 T. Rep.* 737. *3 Term Rep.* 657.

In

In general, *process* may be amended, where there is any thing to amend by. 1 *Term Rep.* 782. Also the teste of a judicial writ is amendable. *Yelv.* 64.

May amend
without imparlance.

By rule *Mich.* 1654. *f.* 13. the plaintiff may amend his declaration, paying costs, or giving an imparlance, at the plaintiff's election, by the order of court, or of a judge, after it is entered, if the amendment be but a small matter, that it doth not deface the roll.

In matters of
form, after plea
without costs.

A declaration may be amended in matter of form, after a general issue pleaded, and before entry, without paying costs or giving an imparlance; but if amended *in substance*, the plaintiff must pay costs, or give an imparlance; and if the amendment be *in substance*, after a *special plea* pleaded, the plaintiff must pay costs, though he had rather give an imparlance. And in all cases of amendment after plea pleaded, the defendant has liberty to plead again, and *has two days* for that purpose after the amendment made and payment of costs. *N. on R. M.* 10 *Geo.* 2. 2 *Str.* 950. If a rule to plead be entered the same term the amendment is made (though before such amendment), it is sufficient, otherwise a new rule to plead must be entered. For there must be a rule to plead to warrant the judgment. 1 *Salk.* 517. 520. *Ibid.*

No new rule
necessary.

Shall not add a
new count.

The plaintiff, after plea pleaded, or after the end of the second term, shall not add a new count to his declaration, under pretence of amending. 1 *Wilf.* 149. *Aubeer v. Barker.*

The reason is that the plaintiff is obliged to declare within *two terms*; and a *new count*, or right of action is considered as a *new declaration*. 1 *Wilf.* 223. *Waters v. Bovell.*

Two days after
amendment to
plead.

If plaintiff amend his declaration, the defendant shall have *two days*, exclusive of the day of amendment, to alter his *first plea*, or *plead any other*. *N. on R. T.* 5 & 6 *Geo.* 2.

No amendment
after two terms
by adding a new
count.

Application was made to amend by adding *two counts* the *term next after the term* in which declaration was delivered, and after defendant had pleaded, refused. *Aubeer v. Barker*, 1 *Wilf.* 149.

May file a new
bill to amend by.
After verdict.

Leave was given to file a *new bill* to amend by. *Str.* 583. *Ruffel v. Martin.* After verdict, court ordered an amendment of the declaration, *by the bill*. *Str.* 1151. *Wilder v. Handy*, 1162.

If

If the *record is made up and passed*, and either party want to amend the pleading, it will be ordered on payment of costs: For the record may be ingrossed anew, and the costs make amends, *although notice of trial be given*, even in a country cause.

And I have heard, that *Mr. J. Buller* made such an order, the assizes being very near indeed, and record made up and passed, that the defendant might amend *his plea* on payment of the costs. This shews that judges now consider that the *justice of the case* ought to be decided, at the *least expence to the parties*.

Defendant demurred to the declaration, summons to amend. Master was of opinion he had *two days* time to plead from the date of the order.

After demurrer, amendment.

Replication was amended after verdict, by inserting the words "*and the defendant does so likewise*:" at the end of the replication, instead of, *&c. Cowp. Rep. Sayer v. Pocock.*

Replication amended.

The plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made a *remanet* for defect of jurors. *Say. Rep. 285.* So he may withdraw his replication and reply *de novo*, after a lapse of six years. *2 Burr. 756. Alder v. Chip.*

Amendment of replication.

But after verdict the court will not let plaintiff alter his replication and reply fraud. *2 Str. 1002.* So if plaintiff be nonsuited, the court will not give him leave to reply *de novo.* *5 Burr. 2692.*

A bill on the file may be amended at any time before plea pleaded, *during the term* of which it is; but not afterwards, without leave of the court. *N. on R. M. 10 Geo. 2. Reg. 2.* In the *Duchess of Marlborough v. Widmore*, the amendment was allowed on a particular reason; for if it had not been there allowed, the action would have been lost by the running of the statute of limitations. *1 Wils. 149. Str. 890. Ex. of D. Marl. v. Widmore.* It was altered by laying the promise made to the executors, instead of the testator.

Bill on file may be amended.

There is no instance in which the court had given leave to amend *as to the parties to the suit in a qui tam action* after a demurrer. *Buller, J. Evans qui tam v. Stevens, 4 Term Rep. 228.*

Qui tam actions.

In a *penal action*, under the statute of usury, the court refused to amend declaration; the writ issued 9th Dec. 1792, declaration *E. T. 1794.* In *Trinity term*

If there be great delay in proceeding in penal ac-

1794,

tions, court will not suffer an amendment in substance.

1794, issue delivered, *with notice of trial for the sittings after that term*; before trial mistakes were discovered in the declaration, which was amended by leave; it was agreed the cause should be tried *same sittings*, in case defendant chose to waive pleading *de novo*.—He did plead *de novo*; and notice of trial was then given for sittings after *M. T. 1794*.—Two days before trial, plaintiff discovered mistakes in the amount of the sums stated to be lent, and the interest received. In *Hil. T. 1795*, he applied to amend: Court refused, on account of the extraordinary delay throughout the whole of the proceeding; they said, it was against the policy of the law, that *penal actions* should be kept suspended over the heads of defendants; and the stat. of *El.* was passed in order that they should be proceeded upon with all expedition. *Steel qui tam v. Sowerby*, 6 *Term Rep.* 174.

31 E. c. 5.

Demise in ejectment amended.

If on entry to avoid a fine, the demise is laid previous to the entry, and plaintiff would be barred by the fine, if he had been put to bring a new ejectment; it may be altered, on paying costs, *Doe v. Pilkington*, 4 *Burr.* 2447.

Term in ditto.

The term in ejectment being near expiring, it was amended without any consent. 2 *Str.* 1272. *Oates v. Shepherd.*

Amendment by laying the promise as made to the executor.

If plaintiff declares as executor, on a promise to the testator, and the statute of limitations pleaded, and issue joined, plaintiff may on motion amend, by laying the promise as made to himself, on payment of costs, and liberty for defendant to plead *de novo*. *Str.* 890. *D. of Marl. v. Widmore.*

A bill of Middlesex.

A bill of *Middlesex* filed of record as of the 24 *Geo.* 3. when it ought to have been of the 25th, may be amended agreeable to the truth. *Green v. Rennet*, 1 *Term Rep.* 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the exchequer-chamber. *Ibid.* Per Buller, J.

After demurrer and argument.

After demurrer and argument only, court gave leave to amend. *Giddins v. Giddins*, cited in 1 *Burr.* 321. So where

where the demurrer is first argued, and before any trial of the issues. *Ibid.* But after verdict on the issues, and contingent damages found upon the demurrers, the court refused. *Robinson v. Rayley*, 1 Burr. 316. nor can the demurrer be withdrawn *after trial* and verdict. *Ibid.* After demurrer and joinder, either party may amend. 2 Salk. 520. 2 Str. 846. After demurrer to plea argued and stood over, the court gave plaintiff leave to withdraw it, and reply to the plea. *Say. Rep.* 316. But vide *Say. Rep.* 116. 1 Burr. 321.

After verdict.

After argument on special demurrer and *before* the court gave judgment, leave was given to amend. *Str.* 954. *Bishop v. Stacey.* This is now done daily.

Special demurrer.

And I have known the issue-roll amended by a judge's order after filed, in *point of substance.* *Sed qu.*

An amendment of a plea after two terms was allowed. *Waters v. Bovell*, 1 Wils. 223.

Motion to amend in a *qui tam* action, after record withdrawn, from 100l. to 88l. *Aston, J.*—The courts have gone a great way in allowing amendments, towards the attainment of justice: They have amended in cases where the limited time of bringing an action would run against the plaintiff, if he were to be put to bring a new one. 1 Str. 890. There is no distinction between *qui tam* actions and civil actions, where an amendment at *common law* is applied for.—The court will not alter the charge, indeed, but the amendment here prayed will not do that; it is only to alter the sum of 100l. to 88l. and the penalty will be consequently reduced. Rule absolute, on payment of costs. *Mace qui tam v. Lovett*, 5 Burr. 2833. But it would be contrary, if it was to make a *new charge*, or materially change the offence. *Hodges v. Teale*, cited in S. C. Vide *Bonfield qui tam v. Miller*, 2 Burr. 1098. which was an amendment in the altering *the date of the note, all the pleadings being in paper*: Lord Mansfield said, That whilst all is in paper you may amend. The statutes of amendment do not extend to *penal actions*. This is an amendment *at common law*.

An amendment made in a *qui tam* action after record withdrawn.

It seems plaintiff had leave to amend his declaration, by laying his *venue* in a different county. *Griffith qui tam v. Hollyer*, T. 29 & 30 Geo. 2. 2 Burr. 1098. The pleadings were all in paper, and this was an amendment at common law.

Replications may also be amended. *Lord Ray.* 1441.

After

After an arrest of judgment.

After judgment arrested, the court refused to amend, on payment of costs, the declaration. *Collins v. Gibbs*, 2 Burr. 899.

All rules to amend are upon payment of costs, *Loft. 155*.

To enable the defendant to plead a tender, the declaration will be ordered to be intitled specially. *Smith v. Key*, *Ibid.* 638.

After verdict.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrers and plead, court refused. 1 Burr. 316. *Robinson v. Rayley*. The court will not allow the plea to be amended after demurrer, when plaintiff has lost a trial. *Rep. in temp. Hard.* 171.

Variance in the name of attorney.

A variance between the name of the attorney for the plaintiff in the warrant on the roll, and in the memorandum of the issue was suffered to be amended after error brought, and the variance assigned for error on payment of costs of the writ of error. *Richards qui tam v. Brown*, *Dougl.* 114. *Vide* 2 Str. 807. 2 Lord Ray. 1532. 1 Term Rep. 782.

After verdict and joinder in error.

Verdict on the first issue, and no notice taken of the last, after error and joinder in the house of lords; this court allowed it to be amended by the judge's notes on payment of costs. *Petrie v. Hannay*, *Bart.* 3 Term Rep. 659.

Another amendment after assignment of errors.

On a writ of error in the exchequer-chamber, it was assigned for error, on a judgment on a demurrer to the plea, that the damages *occasione detentionis debiti* were not said to be awarded *ex assensu suo*; and *Pengelly, C. B.* having doubts whether the case was within 16 & 17 Car. 2. c. 8. s. 1. the court of B. R. was moved, and amended the judgment in the original record, and the transcript being afterwards amended, the court of exchequer-chamber affirmed the judgment. *Tully v. Sparkes*, 2 Str. 869.

Continuances.

The entering of continuances, or other ministerial acts, are amendable after the term, at common law. 1 Str. 139.

Ca. fa.

A *ca. fa.* may be amended after executed by the judgment roll in the return, and made to a right day, although it stated a wrong one in the term. This was ordered in *Trinity term*, 31 Geo. 3. *Vide* 2 Black. Rep. 836, and *Barnes* 10. *Say. Rep.* 12. 2 Term Rep. 737. 3 Term Rep. 657. A *testatum* amended by making it

it conformable to the judgment, and to sue out a *ca. sa.* to warrant it. 6 Term Rep. 450. *Shaw v. Maxwell.*

The court permitted an amendment in a writ of execution, by altering the sum in the writ, after a motion to discharge one of the defendants, without costs. *Laroche v. Wasbrough*, 2 Term Rep. 377.

So they permitted one of the names of the plaintiffs, who was dead after *ca. sa.* executed, to be struck out. *Newnham and another v. Law*, 5 Term Rep. 577.

A verdict may be amended by the judge's notes, and entered only for the plaintiff on the good counts, though a general verdict and entire damages. *Eddowes v. Hopkins exec.*, Dougl. 375. Verdict amended.

If there be a special verdict, the court will amend it by the notes of counsel, or even by an affidavit of what was proved on the trial. 1 Str. 514. Special verdict.

Amendments may be made after error brought; and it is settled, that costs shall be allowed plaintiff in error, provided the amendment be made after final judgment, and the plaintiff after notice of the amendment, do not proceed further. 2 Ld. Ray. 897. But if the amendment be made before final judgment, 1 Ld. Ray. 95. or the plaintiff proceed after notice, he shall not be allowed his costs. 1 Salk. 49. Vide 2 Str. 837. Cro. Jac. 429. 628. Hardr. 505. 1 Wils. 337. After error.

Mutual Debts.

AT common law, if the plaintiff was more indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to strike a balance, he could only go into a court of equity for doing of what is most clearly just and right to be done; and in order to prevent such expence, by stat. 2 Geo. 2. c. 22. it is enacted, "That where there are mutual debts between the plaintiff and defendant, and if either party sue, or be sued as executor or administrator, where there are mutual debts between the testator or intestate, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case requires, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given

T

" given

Mutual debts
may be set off;

unless on bond,
then to be
pleaded.

Real sum due to
be set out in plea
of set-off.

Mutual debts
between a bank-
rupt and any
other person,
how to be set off.

“ given of the particular sum or debt so intended to be in-
“ fisted on, and upon what account it became due, or
“ otherwise such matter shall not be allowed in evidence
“ upon such general issue.”

8 Geo. 2. c. 24. enacts, “ That mutual debts may
“ be set against each other, either by pleading in bar, or
“ given in evidence on the general issue, in the manner
“ as in the 2 Geo. 2. c. 22. mentioned, notwithstanding
“ ing that such debts are deemed in law to be of a different
“ nature, unless in case where either of the said debts
“ shall accrue by reason of a penalty contained in any bond
“ or speciality; and in all cases where either the debt for
“ which the action hath been, or shall be brought, or the
“ debt intended to be set against the same hath accrued, or
“ shall accrue by reason of any such penalty, the debt in-
“ tended to be set off shall be pleaded in bar; in which
“ plea shall be shewn how much is truly and justly due
“ on either side; and in case the plaintiff shall recover
“ in any such action or suit, judgment shall be entered
“ for no more than shall appear to be truly and justly
“ due to the plaintiff, after one debt being set against
“ the other as aforesaid.” Made perpetual, 14 Geo. 2.
c. 34. 21 Geo. 2. c. 33. 24 Geo. 2. c. 28.

It hath been holden, that in an action on bond, the
defendant must set forth in the plea *what is really due*
on the bond, before he is entitled to set off under this
statute, and such averment is traversable. *Symonds v.*
Knox, 3 Term Rep. 65.

The cases of *set off* are understood to be in the nature
of *cross actions*: it will lie on the defendant, if he sets
off *cash notes*, to prove *every thing* necessary to consti-
tute his demand; therefore he must prove *the time* when
he received them. *Dickson v. Evans*, 6 Term Rep. 57.

By 5 Geo. 2. c. 30. “ Where it shall appear to the
“ commissioners, that there has been mutual credit given to
“ the bankrupt and any other person, or mutual debts
“ between the bankrupt and any other person, at any time
“ before such person became bankrupt, the commissioners
“ or the assignees of the bankrupt’s estate, shall state the
“ account between them; and one debt may be set against

^a Vide Bull. N. P. 129. when a bail-bond may be set off.

The statutes only extend to actions founded on *contracts* either *express*
or *implied*, but not to *torts* or *actions of wrong*. *Abraham v. Knight*, Bull.
181. Vide Cowp. 156.

“ another,

"another, and what shall appear to be due on the balance,
"and no more, shall be claimed or paid on either side."

This act is founded in good sense, and it provides that the assignees shall not recover against a debtor of the bankrupt, what was due to the bankrupt on one side of the account, without also taking into consideration, the other side of the account, and seeing on which side the balance lies. *Lord Kenyon. Dickson v. Evans, 6 Term Rep. 58.*

One object of this act was, to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending he was a creditor at the time of the bankruptcy. *Grose, J. Ibid.*

It was holden that in an action by assignees of a bankrupt defendant could not set off a debt due from the bankrupt, 1 *Wils. 155*. But it was afterwards held that he might set off a debt due to him from the bankrupt, for the assignees are the bankrupt. *Ridout v. Brouch, Cowp. 134.*

In replevin, the avowant justified under a distress for rent; the plaintiff at *nisi prius* insisted, that there was more due to him than the rent amounted to, and *Dennison J.* refused the evidence; upon a motion for a new trial, the court held that 2 *Geo. 2.* did not extend to the case of a distress, for that is not an action, but a remedy without suit; they likewise declared, that it did not extend to *detinue*, and the like actions of wrong. *Bull. 181.*

Cannot set off in replevin.

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off. *Ibid. 179. Cooke v. Dixon.*

If the debt is of an equal sum, action barred.

If the defendant's demand does not countervail the plaintiff's, he should move the court wherein the action is depending, for leave to pay so much money into court, as with his own demand will be sufficient to satisfy the plaintiff's.

Defendant may move to pay money into court, and set off.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off, and upon motion in time, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Say. Rep. 316.*

Of withdrawing general issue.

The notice of set-off should contain *certainty*; for the legislature designed them to be in the nature of

Notice should contain certainty.

cross actions, and therefore they should have that *certain*ty, so that the plaintiff may be able to make a proper defence.

Set-off reducing demand under 40s.

A set-off reducing the plaintiff's original demand under 40s. does not affect the jurisdiction of the superior courts. So that if plaintiff recovers 1s. damages, where there is a set-off, he must have costs. *Str.* 1191. *Pitts v. Carpenter*, 1 *Wils.* 19. *S. C.* 3 *Wils.* 48. 2 *Wils.* 68. *Doug.* 448. So, if a tender be pleaded.

A debt due to defendant as surviving partner, may be set off against a demand on him in his own right.

If there be a debt due to the defendant as surviving partner, it may be set off against a demand on him in his own right. For the court said, that the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately, if any such had been due; and therefore there could be no reason why the set-off should not be allowed. *Slipper et al. v. Stidstone*, 5 *Term Rep.* 493. 6 *T. R.* 582. *S. P.*

Mutual credit may be constituted though the parties do not mean particularly to trust each other; as if a bill of exchange accepted by *A.* get into the hands of *B.* and *B.* buys goods of *A.* there is mutual credit between *A.* and *B.* which may be set off by *B.* though *A.* did not know, when he let *B.* have the goods, that such bill was in his hands. *Hankey v. Smith*, 3 *Term Rep.* 507. *notes.*

Defendant entitled to a particular of plaintiff's demand.

As the defendant is entitled to the particular of the plaintiff's demand, it is now the practice, that the plaintiff should have a particular of the defendant's demand, *in* which he means to set off. This is done by summons; and if such particular is not delivered within the time limited by the order, the defendant is precluded going into his set-off.

Bankrupt.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due until *after* the act of bankruptcy, and was then outstanding in the hands of third persons; yet the defendant having paid the amount *after* the commission issued, and *before* the action brought by the assignees is entitled to set off the same, under the words *mutual credit* in the 5 *Geo.* 2. c. 30. s. 28. *Smith and others v. Hodgson*, 4 *Term Rep.* 211.

Two causes tried at same sitting, plaintiff took a verdict for his whole sum; and held, that he

To an action on a promissory note, the plaintiff took a verdict for the whole sum; the defendant had, at the same sittings, an action against the plaintiff for eleven pounds, to which there was a notice to set off the note of

of hand; court held, that notwithstanding the verdict, the note of hand might be set off, for if, at the time of the action brought, there are mutual demands, they, by the statute, may be set off, and justice may be done by entering a *remittitur* on the first record as to so much.

2 Burr. 1229. *Baskerville v. Brown, et é contra.*

Debt upon a simple contract may be set off against a specialty debt^a, a simple contract against a debt upon an annuity bond^b, mutual debts between the testator and executor, without suit^c, simple contract against debt upon a lease for non-payment of rent^d, and all actions where the demands are of the same nature, may be set off, and a judgment in *K. B.* may be set off against a judgment in *C. P.* 3 *Wilf.* 396. but notice of set-off need not be given by defendant, in an action for money had and received to plaintiff's use, where defendant had paid plaintiff his whole demand (except what he retained for his labor and service). 4 Burr. 2133. *Dale v. Sollet.*

But debt due to a man in right of his wife, in an action against him, on his own bond, cannot be set off^e, nor can a penalty upon articles of agreement, though forfeited^f, nor simple contract for clothes to a bail-bond^g, nor can there be a set-off in replevin, though the distress was taken for rent^h.

A joint debt cannot be set off against a separate demand, nor a separate debt against a joint one; nor can defendant sued as executor or administrator set off a debt due to himself personally; nor if sued for his own debt, can he set off what is due to him as executor or administrator.

In an action brought by the assignees of a bankrupt for money due to the bankrupt, the defendant may plead a set-off of money due from the bankrupt to him: but if some of the counts are for debts arising *since* the bankruptcy, he cannot plead a set-off as to those counts. *Ridout v. Brough, Cowp. Rep.* 133.

To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shews further that such notes came to his hands before the bankruptcy. *Dickson & al. ass. v. Evans, 6 Term Rep.* 57.

might still make a set-off, and after enter a *remittitur*.

In what actions there may be a set-off.

^a Bull. *Nisi Pri.* 175.

^b 2 Burr. 820.

^c Bull. 75.

^d Ibid. 177.

In what cases a set-off cannot be pleaded, or notice given.

^e Bull. 175.

^f Ibid.

^g Ibid.

^h Ibid. 177.

Joint and separate demand.

May set off to an action at assignees of a bankrupt.

Cash notes cannot be set off at assignees, unless they came to hand before bankruptcy.

Difference
between pay-
ment and set-off.

There is a great difference between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land: but a set-off supposes a different demand, arising in a different right. Therefore it was held, that to an avowry for rent in arrear, the tenant may plead payment of a ground rent to the original landlord. *Sapford v. Fletcher*, 4 Term Rep. 511.

The plea of set-off must state plaintiff's being indebted at the commencement of the suit, and not at the time of the plea pleaded.

It is said, that a judgment obtained by a defendant against the plaintiff after declaration delivered, and before plea pleaded, may be pleaded as a set-off. *Reynolds v. Beerling*, cited in Dougl. Rep. 112. And that, although it do not appear, that the cause of action, on which the defendant's judgment was obtained, was prior to the commencement of the plaintiff's action. But in *Evans v. Proffer*, it was determined, that a plea of set-off, that plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; for it should state that he was indebted at the commencement of the action; and Buller Justice said, that on looking into the case of *Reynolds v. Beerling*, he found, it could not be supported. 3 Term Rep. 186.

Partner or
executor.

Where a partner or executor brings an action in his own right, for money received after the death of the other partner or testator, the defendant may set off whatever was due to him from the plaintiff. *Smith v. Barrow*, 2 Term Rep. 476.

Where the debt
is not by way of
penalty.

If two agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of weekly damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche*, 2 Term Rep. 32.

Money lent may
be pleaded to
debt on an
annuity bond.

In debt upon an annuity bond, the defendant, after oyer, pleaded a set-off for 500l. for money lent exceeding the yearly sum incurred for the annuity, and offered to set off as much, &c. and on demurrer, the plea was holden good. *Collins v. Collins*, 1 Burr. 820.

If

If an action is brought by or against a trustee, a set-off may be made of money due to or from the *cestui que* trust. 1 *Term Rep.* 622.

A debt barred by statute of limitations cannot be set off; if pleaded, the plaintiff may reply the statute; if it is given in evidence, plaintiff may object to it. *Bull.* 176. *Str.* 1271. *Remington v. Stephens.*

A defendant may, after pleading the general issue, move to withdraw it, and plead a-new with a set-off. *Str.* 1267. *Blackburn v. Matthias*, 1 *Term Rep.* 693.

A broker with a commission *del credere*, cannot prove, under a notice of set-off, a loss upon a policy happening before a bankruptcy, in an action by the assignees of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set off under the general issue. *Grove v. Dubois*, 1 *Term Rep.* 112. *Vide* 28th sect. of 5 *Geo.* 2. c. 30.

A judgment in the *King's Bench* may be set off in the *Common Pleas*, and the balance, due to plaintiff, ordered to be paid, upon motion. 3 *Wils.* 396. *Barber administrator v. Braham.*

A judgment can be pleaded by way of set-off, though a writ of error be pending thereon. *Reynolds v. Beering*, and *Evans v. Prosser*, 3 *Term Rep.* 187.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a *fresh security* to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set off against any demand of the prisoner. 1 *Term Rep.* 557. *Jaques v. Withy.*

Where the plaintiff's original demand was 43s. and a set-off of 4s. reducing it to 39s. for which the plaintiff had a verdict; court held, on a motion for a suggestion on the court of conscience act, that there is a difference between the case of mutual debts subsisting where the plaintiff's demand is more than 40s. the defendant's demand reducing it to a less sum; and the case where the plaintiff's original demand was more than 40s. and the defendant, before the commencement of the action, hath by payment in part, reduced it to less than 40s. In the *first* case, the plaintiff must sue here, or lose part of his demand, because he doth not know whether the defendant can or will set off any

A debt barred by statute of limitations, cannot be set off.

May, after plea of general issue, move to withdraw and plead a-new.

A broker with commission *del credere*, cannot prove a loss under notice of set-off.

Judgment in *K. B.* may be set off against one in *C. P.*

Error depending.

Prisoner discharged, fresh security.

Costs in case plaintiff does not recover 40s. where the original demand is reduced under that sum by set-off.

Doug. 448.

demand against him; but in the *latter* case, the plaintiff well knowing that he hath been paid such part of his original demand as reduces it to less than 40s. hath no right to come to this court, and demand more than 40s. but must go to the county court. In the first case mutual debts are at the commencement of the action; in the latter case not; for payment of part by the defendant to the plaintiff himself, is not a debt owing by the plaintiff to the defendant, but a discharge of the plaintiff's demand *pro tanto*. No set-off is used or is necessary in such case, but payment of part is proved under *non assumpsit*. Rule discharged. *Gross v. Fisher*, 3 Wils. 48. 1 Sir. 1191. 1 Wils. 19. But if verdict be for less than 40s. without a set-off, if he live within the jurisdiction of the court of conscience with the plaintiff, he may pray a suggestion and have costs. 2 Wils. 68.

Of paying Money into Court.

Why introduced.

THIS practice was introduced for the sake of giving a party (who never had it in his power to make a tender, or neglected to make one) an opportunity of satisfying the debt for which the action had been commenced, and likewise to deliver him from the necessity of proving the tender, if he had made one.

When the dispute between the parties is not whether any, but what sum of money is due to the plaintiff, it is necessary that so much as is acknowledged by the defendant, be brought into court; that is, paid into the hands of the proper officer for the use of the plaintiff, who may at any time either *before* or *after* trial, though nonsuited, receive the same, the defendant having confessed so much to be due.

May take an objection to the action, though money be paid into court.

Payment of money into court, is only an acknowledgment that the plaintiff is entitled to recover the sum so paid; but it does not preclude the defendant from taking any objection to the action beyond that sum; though, unless such sum were paid, such objection would be a bar to the plaintiff's action. *Cox and another v. Parry*, 1 Term Rep. 464.

May be paid into court before plea and after, by a judge's order.

Buller J. Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded, 1 Wils. 157. and now, even after plea, it is perpetually

perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this practice; because, if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to really take it. That is the case in general. *Griffiths v. Williams*, 1 Term Rep. 710.

Money may be paid into court in all actions where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury: it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril. 2 Burr. 1120. *Hallet v. East Ind. Co.*

In what actions money may be paid into court.

In actions on the case upon *indebitatus assumpsit*, where there is a *quantum meruit*, Str. 576.; debt for rent; 1 Salk. 596. covenant for non-payment of rent, *Barnes* 198.; but not for repairing, Salk. 596.; covenant in a sum certain, as 11l. for not dressing corn, 2 *Barnes* 229.; 5l. for advanced rent for ploughing meadow ground, 2 *Black. Rep.* 837.; to find diet and lodging or pay 10l. 8 *Mod.* 305. replevin, where defendant avows for rent in arrear, Salk. 596.; *ejectment* for rent, stat. 4 Geo. 2. c. 28.; non-payment of mortgage-money, Str. 413.; upon a charter-party of *af-freightment*, where the breaches are only for freight and demurrage, 2 Burr. 1120. *Trover* for goods not being ponderous, the plaintiff has been ordered to shew cause why he should not accept them, *Barnes* 200.; *trover* for money, 1 Str. 142. So in *trover* for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damage above its real value, but that its real and ascertained value must be the sole measure of the damages, 3 Burr. 1344. *Fisher v. Prince*. Debt for 5l. for killing a hare, Str. 1217.; for penalties on the game laws, being an action popular, 2 *Black.* 1052.; upon a policy of assurance, stat. 19 Geo. 2. c. 37. s. 7.; may be brought into court upon the common rule of course, and also at the suit of an executor, Str. 796.; but in covenant upon a charter-party, where the breach is not

So in these actions.

Trover.

When court must be specially moved.

for payment of money, and *trover*, and debt for a penalty, the court must be specially moved upon an affidavit of the facts.

If the defendant pay money into court upon some of the counts only, and plaintiff takes it out, he is only entitled to costs of those counts.

In an action on a policy of insurance—There were several counts averring interest in different persons—The defendant paid money into court on *some* of those counts, which plaintiff took out. And the master taxed plaintiff's costs on those counts.—Motion to review the taxation, and allow costs on *all* the counts: *Lord Kenyon*, When a defendant pays money into court on *some* of the counts *only*, it is saying in other terms, that he admits that the plaintiff has cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts, and the plaintiff, by taking the money out of court, precludes himself from all right to the other counts.—Rule refused. *Bailie v. Cazalet*, 4 *Term Rep.* 579. If this should be otherwise, a plaintiff would add unnecessary counts for the purpose of harassing his debtor.

Formerly this court refused, in debt for rent, leave to pay money into court. *Caf. temp. Hard.* 173. But there is a distinction between those actions of debt, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty. 3 *Mod.* 41. *Cro. Jac.* 128. 498. 629. and those actions wherein the plaintiff may recover less, as in debt for rent, 5 *Mod.* 212. or on a simple contract, 1 *H. Black. Rep.* 549. In the former, the defendant cannot bring money into court, 2 *Str.* 890. though he may move to stay the proceedings on payment of the *whole* debt and costs: but in the *latter*, the defendant has been allowed to bring money into court, 1 *Vent.* 356. *Salk.* 596. because the plaintiff does not recover according to his demand, but according to the verdict of the jury. *Tidd* 410.

Upon bond, money may be paid into court.

Formerly the defendant, in an action of debt upon bond, who had obtained the common rule, must have brought the whole penalty into court; but now this hardship is remedied by *stat. 4 Ann. c. 16. s. 13.* whereby it is enacted, *That if, pending an action upon a bond, with condition to be void upon payment of a less sum, the defendant shall bring into court all the principal money, and interest due, and costs; the said money shall be*

taken

taken to be a full satisfaction of the said bond, and shall discharge defendant^a.

This act of parliament reforms in some instances an erroneous course of proceeding in the courts of law and equity, which ought never to have prevailed, and which the courts themselves *might* and *ought* to have remedied, but did not. Therefore it should not only have the most *liberal* construction, but the courts ought to exercise their *own* authority, to *extend* the spirit and reason of this parliamentary interposition, "for the *easier, speedier, and better advancement of justice*" to cases *not mentioned* in the act. This act meant, that in cases of *penalties* by way of *security*, the clear final justice of the case should be attained in courts of law.

The condition of a bond was to pay 40l. by 5l. *per annum*. An action was brought, and on motion the court gave liberty to bring into court the arrears on payment of costs. 2 Str. 814. *Bridges v. Williamson*. And it has since been held, that paying all past installments with interest and costs is sufficient; and money not yet due was ordered to be paid to the party who brought it in. Str. 957. *Darby v. Wilkinson*. And the court held, that it is but reasonable they should take care not to prejudice the plaintiff, who will have a legal advantage by signing judgment; therefore ordered him to sign his judgment, but not to take out execution, until the payments became due. Str. 958. S. C.

The plaintiff declared on a bond dated in 1775 for 2400l. proclamation money of *North Carolina*, averring that it was of certain value. — Motion to pay the 2400l. into court, being the penalty of the bond; the court refused it. *Cur.* The proclamation money was of a certain value when the bond was given, and also when forfeited, but by change of time and circumstances, it is rendered of no value whatever, therefore justice would not be done between the parties if we were to determine that defendant should be at liberty to pay that which is of no value, but which had he paid his debt when it became due, would have been of great value. For the master cannot fix the value of foreign money, and the jury are the proper judges of

^a Per *Cur.* "Till bail put in, one is not in a condition to move to bring in principal, interest, and costs. 7 *Mod.* 140.

this

this money. Rule discharged. *Cuming v. Monroe*, 5 Term Rep. 87.

This in vacation time, may be done by summons.

In what actions money cannot be paid into court.

2 Qu. If it cannot now be done?

Actions on the case for immoderately driving a hired chaise, and for consequential damages, Str. 787.; *trespass for the mesne profits in ejectment*, 2 Wils. 115.; for dilapidations, Str. 906.; ² debt upon a bond to a sheriff conditioned for the good behaviour of his bailiff; and, inter alia, for paying money collected for the sheriff's ease; upon a bond for the performance of a collateral agreement; upon a counter bond; *trespasses for taking goods*; *replevin*, where it is not for rent, for injuring common by burning turf, in account, money cannot be brought into court.

Action against a carrier.

Assumpsit against a carrier, for not delivering goods, the defendant having advertized that he would not be answerable for any goods beyond the value of 20l. unless they were entered and paid for accordingly; the court allowed him to bring the money into court. *Hutson v. Bolton*, E. 22 Geo. 3. Tidd. 411.

Demand for unliquidated damages.

Payment of money into court, where the demand is for *unliquidated* damages by a judge's order after plea, is irregular; but if the plaintiff take the money out, he waives the irregularity, and cannot afterwards have a verdict, unless he recovers more than the sum paid in. This was an action for negligence. *Griffiths v. Williams*, 1 Term Rep. 710.

May be brought into court in debt for an annuity: But not if there be an agreement to pay absolutely at a day certain.

Money may be brought into court in debt for an annuity, 3 Burr. 1373; but where a bond is given for a gross sum, absolutely at a day certain, viz. April 1750, and an agreement in January 1758 was entered into, that the money should be payable by installments, with proviso that the sums agreed to be taken by installments should be *punctually and regularly* paid by defendant, at and upon the *very days* specified in the defeazance for making the respective payments, otherwise to be void; yet where defendant made two payments good, and neglected one, the court would not allow him to bring that sum and costs into court. 3 Burr. 1370. *Bonafous v. Rybot*.

The court will order satisfaction to be entered on the record in an action on a bond of indemnity on the defendant's

Action on bond to indemnify the parish officers of *Ripley* against any expence that they might be put to by the expected birth of a bastard child of *J. Shaw*, (by defendant and others the parish officers of *Abby de la*

la Zouch,) a parishioner of *Ashby de la Zouch*, but then resident in *Ripley*. Rule why on payment of 40l. the penalty of the bond, together with the costs, satisfaction should not be entered on record. *Lord Lonsdale and others v. Church*, 2 *Term Rep.* 388. was cited against the rule, where it was held, that in an action on a bond, damages may be recovered *beyond the amount of the penalty*. *Lord Kenyon*: I cannot accede to the doctrine in the case cited; according to that, an obligor, who became bound in a penalty of 1000l. conditioned to indemnify the obligee, may be called upon to pay 10,000l. or any other larger sum, however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond and 1s. nominal damages for the detention of the debt. But here the defendant is willing to pay the *whole penalty* and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, &c. the act of parliament 8 & 9 *W.* 3. c. 11. §. 8. expressly says, that there shall be judgment for the penalty; and that the judgment shall stand as a security for further breaches; but the obligor is not answerable in the whole beyond the amount of the penalty. Rule absolute. *Wilde v. Clarkson*, 6 *Term Rep.* 503.

paying the penalty of the bond and the costs of the action.

Vide, p. 22.

After refusal or issue joined, plaintiff may have the money out of court, and costs to the time of paying in, he paying defendant the subsequent costs.

By rule 5 *Jac.* 1. 20s. for every 100l. to be paid to the secondary of the chief clerk for keeping the money, if under 10l. two shillings, and so according to that rate for every greater or lesser sum.

Chief clerk's fees.

If plaintiff's attorney takes the money out of court, he must get an office copy of the rule, pay 3s. take same to Messrs. *Provoost* and *Webb*, who will pay the money, deducting the poundage and receipt.

If plaintiff accepts the money.

Cur. gave leave to withdraw the general issue in order to bring money into court, and replead it, not delaying the plaintiff. *Str.* 1271. 1267. *Say.* 316.

May withdraw plea, and pay money.

How to pay Money into Court.

In order to pay the money into court upon actions, where there can be no doubt but that you may pay the same in; give instructions to counsel for that purpose, with

Method of paying money into court,

with 10s. 6d. indorsing thereon, "*please to move to pay 2l. 5s. into court,*" and on his signing it, take it to Messrs. *Provost and Webb*, pay the money to them, who will give a receipt, pay 2s. 4d.; and poundage, 20s. for every 100l.; if under 10l. 2s.; besides the receipt, 2s. 4d.; then take brief and receipt to the clerk of the rules, he will draw up rule, pay 6s. and 1s. to the box; serve copy on plaintiff's attorney, and at the same time, deliver plea; if plaintiff accepts the money in full discharge of his suit, he must have costs taxed to the time the money is paid into court.

If plaintiff accepts it, how to proceed.

If Plaintiff accepts the Money.

If he accepts the money.

^a 4 Term Rep. 12.

If he accepts the money, and does not proceed for further damages, it is now the practice for him to take an office copy of the rule, and obtain an appointment from the master, and serve same on the defendant's attorney to tax the costs^a; and if after taxation the defendant does not pay same, the plaintiff^a may deliver his issue with notice of trial, and proceed to obtain a verdict, and 1s. damages will carry the costs on producing an office copy of the rule in court, and the master's *allocatur* for costs. If he means to proceed for further damages, he may obtain an office copy of the rule, take the money out of court, and then deliver the issue and proceed to the trial.

Or he may apply for it afterwards, though he be nonsuited or have a verdict against him. 2 *Str.* 1027. 2 *Term Rep.* 645. But beyond the amount of the sum brought in, bringing money into court is no acknowledgment of the right of action; and therefore if plaintiff proceed further, it is at his peril. If he proceed to trial *otherwise than for the non-payment of the costs, and do not prove more to be due to him, than the sum brought in*, the plaintiff on defendant's producing the rule shall be nonsuited, or have a verdict against him, and pay costs to the defendant. 5 *Com. Dig.* 20.

If paid in a week after term.

N. B. If the money is to be paid into court a week after the term ended, then a judge's order is requisite to authorize the clerk of the rules to draw up the rule; but in this case a counsel's hand is requisite to a brief for that purpose, as the order states, that the clerk of the rules be at liberty so to do, on producing a counsel's hand for that purpose.

Ordered,

Ordered, that in case any defendant shall pay money into court under the usual rule, and the plaintiff shall be willing to accept thereof with costs; the said plaintiff's attorney do upon an office copy of such rule, procure an appointment from the master to tax such costs, and serve the same on the defendant's attorney; and that in default thereof, it shall be considered that the plaintiff intends to proceed in the action, to recover a larger sum, than that paid into court. *R. M. T.*

The plaintiff to procure the appointment.

31 Geo. 3.

In *assumpsit* the defendant brought 8l. into court on the usual terms of paying costs to that time; the plaintiff took it out, and taxed his costs, and served the defendant's attorney; and they not being paid, went on to trial, and obtained a verdict for 7l. 18s. The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid; but the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said they would make him allow, upon the execution, the 8l. he had taken out of court, and ordered him the *postea* to tax his whole costs. *Str.* 1220. *Hand v. Lady Dineley*.

If the costs are not paid on bringing money into court, the plaintiff must go on, and cannot have an attachment.

There may be circumstances arise, that money may be paid into court without being subject to costs; as where a plaintiff kept out of the way to prevent a tender, and upon summons before a judge to pay debt and costs, his attorney pretended he had other demands, and so refused to name the sum, which obliged defendant to pay money into court, and apply to the court that so much of the rule as related to costs might be discharged, with costs of the application; the court looked upon these proceedings to be oppressive, and discharged the rule, but not with costs of the application. 1 Burr. 578. *Johnson v. Houlditch*.

In what cases defendant not liable to pay costs.

Court held that an auctioneer had acknowledged himself liable to the action, by paying money into court. 5 Burr. 2640. *Burrow v. Skinner*.

Auctioneer.

The rule to pay
money into court.

Saturday next after 15 days of *Easter*, in the 36th year of *King Geo.* the 3d.

Doe. } It is ordered that the defendant have leave
Roe. } to bring into court 32l. ^aand thereupon, unless the plaintiff shall accept thereof, with costs to be taxed by Mr. *Forster*, in full discharge of this suit, the said 32l. shall be struck out of the declaration, and paid out of court to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the said 32l. upon the motion of Mr. *Morgan*.

Duty 3s.

Rule 3s.

Box 1s.

7s.

By the Court^b.

The meaning of
the rule.

The meaning of this rule is, That if the plaintiffs do not accept the sum brought into court, the same is to be struck out of the declaration; and the plaintiffs, upon the trial, are not admitted to give evidence for the sum brought into court: and if the plaintiffs, upon the trial, do not prove *more* due to them, than the money brought into court, there must be a verdict for the defendants. *Hallet v. E. Ind. Co. 2 Burr. 1120.*

Freight and de-
murrage.

The plaintiffs are at liberty to accept a sum brought into court, in respect to breaches assigned for non-payment of freight and demurrage, and to proceed as to any other breaches mentioned in the declaration (excepting those) if they think proper. *Hallett v. E. Ind. Comp. 2 Burr. 1121.*

Juror with-
drawn.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of payment of money into court. For whenever a juror is withdrawn, each party must pay his own costs. *Buller J.* The *form* of the rule decides this question; for it was part of the rule, that if the plaintiff would *not* accept of the money brought into court, with the costs, &c. the said money shall be struck out of the declaration; then if it be struck out, that is not con-

^a The common pleas rule differs from this; it is so framed, that you may have an attachment for the costs. *Barnes 283.*

^b I have no doubt in case enough has not been paid into court, the defendant may apply to have a further sum paid in, on payment of costs.

sidered

sidered as part of the declaration. In my 5th edition, 262. there is an error, the word *not* is omitted in the statement of this case. *Stodhart v. Johnson*, 3 Term Rep. 657.

The question was, whether, in an action by an Executor, the defendant should be allowed to bring money into court. And on consideration it was held he might, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. *Str. 796. Crutchfield v. Scott.*

If Plaintiff proceeds further, and wishes to accept the Money, and Costs.

A declaration was filed of *Easter* term; plea, and money paid into court same term. Issue delivered in *Trinity* term, with notice of trial for the 6th *July*, which was countermanded the 3d. Application was made to the defendant's attorney for the amount of costs, down to the time of paying the money into court; with an offer to allow the subsequent costs, and settle the balance whichever way it might be; the defendant's attorney refused, insisting that he was entitled to his costs from the commencement of the action. Rule *why the master should not be directed to tax the costs of the plaintiff, to the time of paying the money into court, and the defendant's costs from that time, to the countermanding the notice of trial; and why the defendant should not pay the balance to the plaintiff. Per curiam*: On inquiring of the master, it appears to be the constant and regular practice, that the plaintiff is entitled to have his costs to the time of paying money into court, and the defendant all his subsequent costs. *Hartley v. Bateson*, 1 Term Rep. 629.

N. B. This now may be done by summons.

After verdict for the defendant, plaintiff moved to be allowed his costs to the time of paying the money into court. *Buller J.* Though the plaintiff was entitled to the costs up to the time of paying money into court, if application were made before trial, yet he comes too late after the trial. Rule refused. *Stevenson v. Yorke*, 4 Term Rep. 10.

If there are further proceedings after payment of money into court, and plaintiff wishes not to go on, he is at liberty so to do, allowing the defendant the subsequent costs.

Plaintiff comes too late after verdict.

Tender.

Tender.

TENDER comes from the *French*, *tendre*, in *Latin* *offerre*, and in a legal sense denotes as much as carefully to offer, or circumspectly to endeavor, the performance of any thing belonging to us; as, to tender rent, is to offer it at the time and place where and when it ought to be paid; and it is an act done to save the penalty of a bond, and of money for rent, or contract, before distress or action brought. It may be made in purses, or bags, without shewing, or telling the same, for it is the receiver's business to put it out, and tell it, *Co. Litt.* 208. a.; and it must be by offering the bags to the plaintiff, and not holding them under his arm. *Noy* 74. 5 *Co.* 115. And every tender at the common law, or which is given by statute, must be made before the writ sued out. *Brown's Tend.* 9. See 21 *Jac.* 1. c. 16. s. 5.

When need not lay the money down.

The defendant said, *he had the money in his pocket*, and the plaintiff answered, *you need not give yourself the trouble of offering it, for I will not take it*, held a good tender. *Douglas v. Patrick*, 3 *Term Rep.* 684.

Tender to an attorney.

Payment of a debt to the plaintiff's attorney is good. *Powel v. Little*, 1 *Black. Rep.* 8. And if an attorney properly authorized to write for the money to defendant, and he does so, saying unless he pays him he will sue out a writ, I should conceive a tender before it is sued out, to him, is good, but he must be legally authorized. *Vine Doug.* 624.

If there be a tender of a larger sum than due, and asks change.

If the debtor tenders a larger sum of money than is due, and asks change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum. *Lord Kenyon. Black v. Smith, Peake's Cas.* 88.

No occasion to produce the money if creditor refuse to receive it on account of more being due.

The plaintiff and several other sailors being in a room together, defendant offered them as much money as was sufficient to pay all the crew their legal wages; but did not distinguish the particular sum due to each. The amount of the whole was 11l. the debt due to plaintiff 1l. 5s. All the sailors present refused to receive less than the money that the defendant promised them, which was extorted from him by a mutinous conduct, but the

the defendant did not produce the money, which he had ready to pay them. In an action by one, *C. F.* held, that the tender was a good one, they were told there was enough to pay all, and they objected to receive it, because they wanted more. There is no occasion to produce the money, if the creditor refuses to receive it on account of more being due. *Ibid.*

It has been determined, that a party tendering money could not in general demand a receipt for the money. *Cole v. Blake, Ibid. 179.*

A receipt cannot be demanded.

In an action of covenant for non-payment of rent, defendant pleaded a tender on the day. The witness proved, that defendant went purposely to pay his rent, and said to plaintiff, "*I am come to pay you for the rent,*" but did not put down or shew the money. And it being proved that plaintiff refused upon other ground than that of objecting to the *quantum*, or the *quality*, *Buller J.* held it to be a good tender in this case. *Somerset ass. Spring 1786. Crompt. 152.*

What will be a good tender.

In *Hilary term 1785*, it was held, that a *subpoena* in the exchequer being sued out before tender made, was good.

Subpoena.

There is a difference in pleading a tender in an action of debt, and in an action on the case; in debt, the damages are but accessory, so that in pleading a tender to such action, "*the defendant must pray judgment of the damages;*" but in *assumpsit*, the damages are principal, and he is to plead "*semper paratus,*" with a *proferat hic in curia*, and "*pray judgment de ulterioribus damnis,*" *Salk. 622. 3 Salk. 344.*

In pleading a tender in debt, defendant prays judgment *de damnis*, in case *de ulterioribus damnis.*

If a tender at the day, of corn, or of any other goods of a perishable kind, be pleaded with a refusal, there is no need to plead "*uncore prist.*" *9 Rep. 70. 1 Inst. 207.*

Tender of goods how to be pleaded.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender to plead a tender and refusal, and *uncore prist*; but he must also plead "*touts temps prist.*" *Salk. 622. 12 Mod. 152. Carth. 413.*

Every requisite which is in a particular case necessary to the validity of a tender must, in pleading such tender, be shewed to have been complied with; else the plea is not good. *Salk. 624.*

Every requisite must be shewn.

Tender of stock. Tender of stock must be at the last part of the day it can be accepted, *Str.* 777. and the usual hours must be set forth. *Ibid.* 832.

As to the Time of pleading.

Formerly tender pleaded within four days.

Formerly the plea of tender was pleaded in the same manner as a plea in abatement, *within the four days*, but the following case allows it to be pleaded *after a judge's order*.

But now may be pleaded after a judge's order.

Time was given by a judge's order to plead, until *two days before the essoign day of this present term*, on the usual terms of pleading issuable, &c. This order was not obtained till after the four days rule for pleading was expired. Before the term, and within the time allowed by the judge's order, the defendant pleaded a plea of tender, which plea was *intituled as of the preceding term*. *Aspinall* moved to set it aside, and for leave to sign judgment. *Winn*, for defendant, said, that it was a *fair honest plea*, in its own nature; and that it was *within time*, not being *after imparlance*, but *as of the last term*, and also that it was an *issuable plea* within the meaning of the judge's order; though he acknowledged that a plea in *abatement* (though in strictness indeed issuable) would not be so, because it tended to delay the plaintiff. The court concurred entirely in what *Winn* had urged in support of the regularity of the plea, and the motion was denied. 1 *Burr.* 59. *Kilwick v. Maidman*.

If you wish to plead a tender, as of the *next term*, you must obtain a judge's order for that purpose. A tender is pleadable to a *quantum meruit*. Settled on demurrer. 1 *Str.* 576. *Johnson v. Lancaster*, *Salk.* 622.

Tender to the whole declaration is good. Ruled *Trin.* 19 *Geo.* 3.

Non assumpsit to the whole, and tender as to part, cannot be pleaded.

The defendant cannot be permitted to plead *non assumpsit* to the whole, and a tender as to part; because if the general issue be found for the defendant, it will then appear in the record that no debt is due, and yet that the defendant admits something to be due. *Macallan v. Howard*, 4 *Term Rep.* 194.

Tender made on the day bill filed, will not assist defendant.

A tender was made actually *in the term*, and before a bill filed against the defendant. The bill was filed the

the *same day* the tender was made, and a summons taken out before Mr. J. Buller to intitle the bill (which was of *Hilary* term generally) the day it was actually filed. The judge said, that it would not assist the defendant at all, for he could not take advantage of it in pleading, there being no fraction of a day. *Hil. 30 Geo. 3.*

Fresh Demand and Refusal.

A right to damages, on account of non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof upon such demand, 5 *Bac. Abr.* 12. *Brownl.* 71.; and therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which if proved, plaintiff must have a verdict.

Fresh demand and refusal.

If upon a tender pleaded, the plaintiff will not receive the money, but take issue upon the tender, and it is found against him, the money is lost for ever. *Co. Lit.* 207. *Hob.* 199. *Ld. Ray.* 642.

Where the issue is on a *subsequent demand and refusal*, it should appear in evidence, that the *person who made the demand was properly authorized to receive the money*; that though payment to the attorney while an action was subsisting was good, that it was otherwise to his clerk, who shewed no authority but his master's order to demand it. *Lord Kenyon. Esp. N. P. Hil. 34 Geo. 3.* 115.

Subsequent demand by attorney's clerk not good.

If the plaintiff takes the money out, he may proceed for further damages by joining issue on the general issue pleaded, and confessing the tender in his replication.

If plaintiff takes money out of court.

Tender of amends may be made by justices of the peace, within a month after notice given of an action intended to be brought against them, for any thing done by them *in the execution of their office*, and they may plead the same with *Not Guilty, and any other plea*, with leave of the court; and in case they shall neglect to make such tender, they may, before issue joined, pay money into court. 24 *Geo. 2. c. 44. s. 24.*

Tender by justices.

This statute means only actions of *tort*. *Filtham v. Terry, E. 13 Geo. 2. cited in Sellon, 352. Vide 2 Black. Rep. 589. C. P.* where it was held, that it must ap-

Relates only to actions of tort.

pear he was sued *as a justice* for some *misbehavior* in his *office*, before court will permit him to pay the money into court tendered.

Trespass.

The defendant may, to a trespass *quare clausum fregit*, plead a *disclaimer*, and that the trespass was by negligence, or involuntary, and tender of sufficient amends before action brought; whereupon, or on some of them, the plaintiff shall be enforced to join issue. *Stat. 21 Jac. 1. c. 16.*

Under distress for rent.

Tender may be made before action, for any unlawful act done by a person who has distrained for rent justly due, 11 *Geo. 2. c. 19. s. 20.*; likewise in distraining for money justly due for the relief of the poor. 17 *Geo. 2. c. 38. s. 10.*

Pound breach.

It is no answer to an action for treble damages on the stat. 2 *W. & M. c. 5.* for a pound breach, that the rent and the demand were tendered, after the distress and impounding. *Firth v. Purvis, 5 Term Rep. 432.*

Excise and custom-house officers.

Tender of amends is allowed to be made and pleaded by excise officers for any offence committed *quâ* officers. 23 *Geo. 3. c. 70. s. 30.* And also custom-house officers. 24 *Geo. 3. c. 70.*

Any money coined at the Mint good.

A tender in any money coined at the *Mint*, upon which there is the king's stamp, is good; for all such money is good in proportion to its value, without a proclamation. *Salk. 446. Comb. 387.*

To an avowry for damage feasant when tender to be made.

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the *statute of Jac. 1.* which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. *Lutw. 1596.*

In a plea in bar of tender of rent in replevin, the money ought not to be brought into court.

To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court, because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. 60. Salk. 584.*

On the money being brought into court, on

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises; and then such plea is given by 11 *Geo. 2. c. 19. s. 9.*

If a tender be pleaded with a *toutjour pris*, and the money brought into court, in case the plaintiff would

go for further damages, he must not take the money out of court, but take issue on the tender, or reply a *request* and *refusal*; and if such issue is found against him, he will be barred of his action: but if he take the money out of court, judgment is given for the defendant to go quit. *Ld. Ray. 774. Cliff v. Jones.*

The money cannot be taken out by the defendant, though he has a verdict. *Str. 1027. Cox v. Robinson.*

On a plea of tender with a *profert in curia*, of the money, if the money be not paid into court, the plaintiff may sign judgment, *Str. 638. Pether v. Shelton.*

The money is paid to Messrs. *Provost* and *Webb*, who give a receipt for the same in the margin of the plea, which is to be signed by counsel, and filed with the clerk of the papers.

Action of *assumpsit* on a tradesman's bill, plea of tender as to 2l. 18s. 4d. part of the demand, and *non assumpsit* as to the rest. Verdict for defendant on the tender, and for plaintiff on *non assumpsit*, but with damages under 40s. viz. 7s. 6d. motion for suggestion on *stat. 23 Geo. 2. c. 33. s. 19.* he residing in *Middlesex.* Rule discharged. *Cur.* The tender was not an extinguishment of the debt; and the question is, What appears to have been due at the time of the action brought, for if that exceed 40s. the inferior court has no jurisdiction? *Heaward v. Hopkins, Dougl. 448.*

Tender of Bank Notes.

Buller J. This court has never yet determined that a tender of *bank notes* is at all events a good tender; but if they have been offered, and no objection has been made on that account, this court has considered it as a good tender; and very properly so; for bank notes pass in the world as cash. In this court we have always been inclined to consider them as money, though the question has never yet been directly determined. *Wright v. Reed, 3 Term Rep. 554. Lord Mansfield.* A bank note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash, and it is necessary for the purposes of commerce that their currency should be established and secured. *Miller v. Race, 1 Burr. 459.* They are treated as money in the ordinary course and transaction of business, by the general consent of all mankind;

the tender pleaded and plaintiff goes further.

If the money be not paid into court.

How to pay the money.

Costs after tender made, and the tender found for defendant and verdict for plaintiff on the non assumpsit, 7s. 6d.

Bank notes.

Bank notes treated as money here and abroad.

which gives them the credit and currency of *money*, to all intents and purposes: They are as much money as guineas themselves are; or any other current coin, that is used in common payments as money or cash. They pass by a will which bequeaths money or cash, and are never considered as *security* for money, but as *money itself*. On payment of them, the receipts are always given for *money*, not as *securities* or *notes*. *Ibid.* A tender of a bank note as money, is not, *strictly* speaking, a good tender; but if the tenderer offer to get the money for the note, this makes it a good tender. 2 *Eq. Cas. Abr.* 319.

Pleas in Abatement.

Coverture pleaded in abatement to an action by bill.

AND the said *Mary* in her own proper person comes and says, that she now is, and before and at the time of exhibiting the bill of the said *John*, was, and ever since hath been, covert and married to one *William Morris* then and still her husband, and living, to wit, at *London* aforesaid, in the parish and ward aforesaid, and this the said *Mary* is ready to verify; wherefore because the said *William Morris* is not named in the said bill, the said *Mary* prays judgment thereof, and that the same may be quashed, &c. J. M.

Misnomer pleaded in the christian name to an action by original.

And he against whom the said *James* hath issued his original writ, by the name of *Thomas Stout*, in his proper person comes and pleads that he was baptized by the name of *John*, to wit, at *Westminster* aforesaid, and by the christian name of *John*, hath always since his baptism hitherto been called and known; without this, that the said *John* now is, or at the time of suing forth the said original writ of the said *James*, or ever before was, or at any time since hath been called or known by the christian name of *Thomas*, as by the said writ is above supposed; and this he the said *John* is ready to verify: wherefore he prays judgment of the said writ, and that the same may be quashed, &c. J. M.

The defendant is to file this plea and annex an affidavit, with the clerk of the papers, as follows:

James

In the King's Bench. *James Letch*, Plaintiff,
and
John Stout, sued by the name of
Thomas Stout, Defendant.

^a *John Stout*, of, &c. mealman, the defendant in this cause, maketh oath and faith, That the plea hereto annexed is true in substance, and matter of fact. Affidavit to be annexed to plea.

Sworn, &c.

John Stout.

To be sworn before a judge, and ingrossed on a 2s. stamp paper. If the defendant lives in the country, may be sworn before a commissioner in this court.

And the said *James* says, That notwithstanding any thing by the said *John* above in pleading alledged, the said bill ought not to be quashed, because he says, that the said *John*, at the time of exhibiting the bill of the said *James*, and before, was called and known as well by the name of *Hody* as by the name of *Oddy*, as by the said bill is above supposed; and this he prays may be inquired of by the country, &c. Replication to a plea of misnomer in the surname, that defendant is known as well by one name as the other.

J. M.

A plea of *misnomer* of defendant, beginning, And the said *Richard*, sued by the name of *Robert*, is bad. 5 Term Rep. 487. *Roberts v. Moon*.

And the said *John* in his own person comes and defends the wrong and injury, when, &c. and says, That the supposed promises and undertakings in the said declaration mentioned, if any such were made, were and each of them was made, by the said *John Mead* and *John Wilson*, *Charles Roberts* and *Michael Tew*, jointly, and not by the said *John Mead* only, which said *John Wilson*, *Charles Roberts*, and *Michael Tew*, are still alive; to wit, the said *John Wilson*, in the island of , the said *Charles Roberts*, late at *Liverpool*, in the county of *Lancaster*, but now on a voyage at sea, and the said *Michael Tew*, in *Liverpool* aforesaid; and this the said *John Mead* is ready to verify; wherefore, because the said *John Wilson*, *Charles Roberts*, and *Michael Tew* are not named in the said bill, the said *John Mead* prays judgment thereof, and that the same may be quashed, &c. Partnership pleaded in abatement.

W. B.

If a plea in abatement is to be pleaded in an action brought by original. Vide my *New Inst. Cler.* in C. P. for precedents. 4 Ed. p. 329.

^a If there be no affidavit annexed, the plaintiff may sign judgment. *Cartb.* 402. so if not signed by counsel.

These pleas may be pleaded in person or by attorney, *Lutw.* 7. and to be filed with clerk of the papers.

It is said, *pleas in abatement* may be pleaded by attorney, and with full defence. *Lutw. 7. Thompson v. Stockdale, H. 23 Geo. 3. K. B. Tidd. 337.*

If cause of action
arise *ex con-*
tractu.

If the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties upon each of whom individually, a separate trespass attaches; to the *former*, partners not named may be pleaded in abatement; to the *latter*, others in partnership and not named, cannot.

General Issues.

General issues.

THE general issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it; as in trespass, either *vi et armis* or on the case, *non culpabilis*, not guilty; in debt upon contract, *nil debet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed, or on an *assumpsit*, *non assumpsit*, he made no such promise; or in a real action, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right, the mise or issue is, that the tenant has more right to hold, than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue, by which is meant, a fact affirmed on one side, and denied on the other.

General issue
need not be
signed.

No general issue need be signed by counsel, but it is to be ingrossed on a treble penny stamp paper, and delivered to the attorney for the plaintiff, or may be entered in the book kept by the clerk of the judgments, pay 6d.

Non assumpsit.

And the said *John*, by *R. C.* his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not undertake or promise, in manner and form as the said *A. B.* hath above thereof complained against him, and of this he puts himself upon the country, &c.

Non est factum.

And the said *John*, by *R. C.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said writing obligatory (or indenture) in the said declaration mentioned, is not his deed; and of this he puts himself upon the country, &c.

And says, that he does not owe to the said *Richard* the said sum of 100l. above demanded, or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Nil debet.*

That he doth not owe to our said lord the king, and to the said *Richard*, who sues as aforesaid, the said sum of 100l. above demanded, or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Cur.* Not guilty to an action of debt on 10 *Ann. c. 16.* is not a nullity; and indeed it should rather seem that this is a good plea; for as this is an action for an offence under a penal statute, the defendant by such a plea, says that he is not guilty of the offence. Upon a *devastavit* against executors, *not guilty* may be pleaded as well as *nil debet*. *Coppin qui tam v. Carter*, 1 *Term Rep.* 462. *Same to a qui tam action.*

That the said *A. B.* in his lifetime did not undertake or promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Non assumpsit testatoris.*

That he doth not detain from the said *Richard* the said indenture of lease, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Non detinet.*

That he is not guilty of the supposed trespasss above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Not guilty in trespass.*

That he is not guilty of the supposed trespasss and assault above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Not guilty in trespass and assault.*

That he is not guilty of the premises above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Not guilty in case.*

And the said *John*, by *J. S.* his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not promise or undertake, in manner and form as the said *Benjamin* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Non assumpsit and notice of set-off. To be ingrossed on a treble id. paper, and need not be signed by counsel.*

In

In the King's Bench.

Benjamin Philpot, Plaintiff,
and*John Shears*, Defendant.

Notice of set-off
for work and
labor with
horses, &c.

To be delivered
to the plaintiff's
attorney, and if
necessary to be
proved at the
trial, to be pro-
duced ingrossed
on a treble 1d.
stamp-paper.

If it is a country
cause it is usual
to get one of the
counsel's clerks
to deliver it,
(who goes the
circuit).

Take notice that the above defendant will at the trial of this cause give in evidence, and insist, that the plaintiff before and at the time of the commencement of this suit, was, and still is, indebted unto the said defendant in the sum of 200l. for the use and hire of divers horses, mares, and geldings, by him the said defendant, before then let to hire to the said plaintiff, and at his request; and for the carriage of divers goods, wares, and merchandizes, before then carried by and in divers waggons, carts, and other carriages of the said defendant, for the said plaintiff, and at his like request; and for work and labour before then done and performed by the said defendant and his servants, and with his horses, carts, waggons, and other carriages for the said plaintiff, and at his like request; and also for money before then paid, laid out, and expended by the defendant for the said plaintiff, and at his like request; and for money by the said defendant before then lent and advanced to the said plaintiff, and at his like request; and for money by the said plaintiff before then had and received to and for the use of the said defendant, and for divers goods, wares, and merchandizes, by the said defendant before then sold and delivered to the said plaintiff, and at his like request; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sum of 200l. is still due and owing from the said plaintiff to the said defendant, and out of which said sum of money, he the said defendant will, at the trial of this cause, set off and allow to the said plaintiff so much thereof against any demand of the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, pursuant to the statute in such case made and provided. Dated the day of

1796.

Yours, &c.

To Mr. *A. B.* Plain-
tiff's Attorney.*J. S.* Defendant's
Attorney.

In the King's Bench.

Edward Willis, Plaintiff,
Between and
Leonard Hill, Defendant.

Take notice, That the above defendant will, at the trial of this cause, give in evidence and insist, that he the said defendant heretofore, to wit, in this present *Trinity* term, in the thirty-sixth year of the reign of our lord the now king, in the court of our said lord the king, before the king himself (the said court then and still being holden at *Westminster*, in the county of *Middlesex*) by bill, without the writ of our said lord the king, and by the consideration and judgment of the same court, recovered against the above-named plaintiff 41l. 10s. which, in and by the said court, were then and there adjudged to the said defendant, for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said plaintiff, to the said defendant, and whereof he the said plaintiff was convicted, as for his costs and charges by him about his suit in that behalf expended, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, to wit, at *Westminster* aforesaid, more fully appears; which said judgment is still in full force and effect, not reversed, satisfied, or otherwise vacated; and that under and by virtue of the said judgment, he the said plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, in the said sum of 41l. 10s.; and out of which said sum of money he the said defendant will at the said trial, set off and allow to the said plaintiff, so much thereof against any demand of him the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated, &c.

Notice of set-off
for money due
on a judgment
in the K. B.
N. B. Put the
non assumpsit first.

Yours, &c.

Special Pleas.

AND the said *John*, by J. B. his attorney, comes and defends the wrong and injury, when, &c. and says, That he did not undertake and promise, in manner

Plea of *non assumpsit*, and the statute of limitations.

To be ingrossed on treble penny, and filed with the clerk of the papers.

manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in this behalf, the said *John*, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him, because he saith, that he did not undertake or promise, at any time within six years next before the day of exhibiting the bill of the said *Richard* in manner and form as the said *Richard* hath above thereof complained against him; and this the said *John* is ready to verify; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.^a

J. M.

Replication, that within six years defendant did undertake, &c.

And the said *Richard*, as to the said plea of the said *John*, by him secondly above pleaded in bar, says, that he by reason of any thing by the said *John* in that plea above alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that the said *John* did, within six years next before the day of exhibiting the bill of him the said *Richard*, to wit, on the day of in the year of our Lord 1796, at *Westminster* aforesaid, undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and this he prays may be inquired of by the country. And the said *John* doth the like. Therefore, as well to try this issue, as the said other issue above joined, let a jury thereupon come before our lord the king at *Westminster*, on, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

N. B. This replication the clerk of the papers draws, and there needs no counsel's hand.

Plea of set-off for money lent, laid out, and had and received.

And the said *John*, by *R. P.* his attorney, comes and defends the wrong and injury, when, &c. and says that the said *Richard* ought not to have his aforesaid action thereof maintained against him, because he says, that the said *Richard*, before and at the time of the exhibiting the bill of the said *Richard* against the said *John*, that is to say, on the 1st day of *June*, in the year of our Lord 1796, at *Westminster* aforesaid, in

^a What pleas do not require a counsel's hand, *vide* title *Pleading in Bar*, p. 263.

the county aforesaid, was and still is indebted to the said *John* in a large sum of money, (that is to say) in the sum of 100*l.* of lawful money of *Great Britain*, for so much money by the said *John* before then lent and advanced to the said *Richard*, and at his special instance and request; and in the further sum of 100*l.* of like lawful money, for money before that time paid, laid out, and expended by the said *John*, to and for the use of the said *Richard*, and at his like instance and request; and in the further sum of 100*l.* of like lawful money, for money by the said *Richard* before that time had and received, to and for the use of the said *John*. And the said *John* further says, that the said several sums of money so due and owing from the said *Richard*, to the said *John*, as aforesaid, exceed the damages sustained by the said *Richard*, by reason of the not performing the said several promises and undertakings of the said *John*, in the said declaration mentioned; and that out of which said several sums of money, he the said *John* is willing, and hereby offers to set off and allow to the said *Richard* the full amount of the said damages, according to the form of the statute, &c.; and this the said *John* is ready to verify: Wherefore he prays judgment, if the said *Richard* ought to have his aforesaid action thereof maintained against him, &c.

J. M.

And the said *Richard* says, That he, by reason of any thing by the said *John* above in pleading alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says, that he the said *Richard* was not, nor is indebted to the said *John* in manner and form as the said *John* hath in his said plea in that behalf above alledged; and this he the said *Richard* prays may be inquired of by the country; and the said *John* doth the like, &c. Therefore let a jury thereupon come, &c.

And the said *John*, by *S. U.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the several promises and undertakings in the said declaration mentioned, to wit, on the second day of *May*, in the year of our Lord 1796, at *London* aforesaid, in the parish and ward aforesaid, the said *John* delivered to the said

Richard

Replication
thereto.

Need not be
signed.

Plea of satisfac-
tion in assump-
sit.

Richard one hogthead of sugar, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money thereupon due, owing, or accrued, and which said hogthead of sugar the said *Richard* then and there accepted and received of and from the said *John* in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money as aforesaid; and this he the said *John* is ready to verify; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.

J. M.

Replication
thereto.

Need not be
signed.

And the said *Richard* says, That he, by reason of any thing by the said *John* in his aforesaid plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because protesting that the said *John* did not deliver to him the said *Richard* the said hogthead of sugar in the said plea mentioned, in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any or either of them, or of all or any part of the damages or sums of money thereupon due, owing, or accrued, in manner and form as the said *John* hath above in his said plea in that behalf alledged; for replication in this behalf, the said *Richard* says, that he did not accept or receive the said hogthead of sugar of or from the said *John*, in full satisfaction or discharge of the said several promises and undertakings in the said declaration mentioned, or of any or either of them, or of all or any part of such damages or sums of money as aforesaid, in manner and form as the said *Richard* hath above in his said plea in that behalf alledged; and this he the said *Richard* prays may be inquired of by the country; and the said *John* doth the like, &c. Therefore, &c.

Non assumpsit to
part, and a tender
to the residue.

And the said *T. by A. B.* his attorney, comes and defends the wrong and injury, when, &c. and as to the said several promises and undertakings in the said declaration mentioned, except as to 4l. and 4s. parcel of the said several sums of money in the said declaration also mentioned, says, that he did not undertake and promise, in manner and form as the said *J.* hath above thereof complained against him, and of this he puts himself upon the country. And as to 4l. and 4s. parcel

parcel of the said several sums of money in the said declaration mentioned, the said *T.* says, That the said *J.* ought not to have or maintain his aforesaid action in this behalf against him the said *T.* to recover any more or greater damages than the said 4*l.* and 4*s.* in this behalf, because he says, That he the said *T.* from the time of making the said several promises and undertakings in the said declaration mentioned as to the said 4*l.* and 4*s.* always hitherto was, and still is, ready to pay to the said *J.* the said sum of 4*l.* and 4*s.* and that he the said *T.* before the exhibiting of the bill of the said *J.* to wit, on the 22d day of *April*, in the said year of our Lord 1796, at, &c. in the said county, tendered and offered to pay to the said *J.* the said 4*l.* and 4*s.*; which said 4*l.* and 4*s.* the said *J.* then and there wholly refused to receive from the said *T.*; and the said *T.* now brings the said 4*l.* and 4*s.* here into court, ready to be paid to the said *J.* if he the said *J.* will accept the same; and this he is ready to verify; wherefore he prays judgment, if the said *J.* ought to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said 4*l.* and 4*s.* in this behalf, &c.

The day may be stated under a scilicet.

J. M.

And the said *J.* as to the said plea of the said *T.* by him above pleaded, as to the said 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, says, That he, by reason of any thing by the said *T.* in that plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him to recover his full damages in this behalf; because he says, that the said *T.* did not tender or offer to pay to the said *J.* the said 4*l.* and 4*s.* in manner and form as the said *T.* hath above in pleading alledged; and this he prays may be inquired of by the country, and the said *T.* doth the like. Therefore, &c.

Replication denying the tender.

Join issue as to the non assumpsit, and at the end of the plea of tender, say: And hereupon the said plaintiff freely takes and accepts out of court here the said 4*l.* and 4*s.* so tendered and paid into court as aforesaid; therefore, as to the said 4*l.* and 4*s.* the said plaintiff is satisfied; and as to the trial of the issue above joined between the parties aforesaid, let a jury thereupon come before our lord the king at *Westminster*, on

If the plaintiff accepts the money, and goes for further damages.

next after

by whom, &c. and

X

who

Need not be
signed.

who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

N. B. This issue is made up by the clerk of the papers.

Plea of infancy.

Because he says, that he the said defendant, at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of 21 years, to wit, of the age of 18 years, and no more, to wit, at *London* aforesaid, &c. and this he is ready to verify: wherefore, &c. *B. L.*

Plea of judgment
recovered in
C. P. in as-
sumpsit.

And the said *Roger*, by *J. S.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *C.* ought not to have or maintain his aforesaid action thereof against him, because, he says, that heretofore, to wit, in *Trinity* term, in the 36th year of the reign of his present majesty, the said *C.* impleaded the said *Roger*, in his said majesty's court, before Sir *James Eyre* Knight, and his companions, then his majesty's justices of the bench at *Westminster* in the county of *Middlesex*, in a certain plea of trespass on the case, on promises, to the damage of the said *C.* of 60*l.* on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in the said court of the bench aforesaid in that plea; that afterwards, to wit, in that very same *Trinity* term, in the 36th year aforesaid, the said *C.* by the consideration and judgment of the said court, recovered against the said *R.* in that plea 60*l.* for his damages which he had sustained, on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and whereof the said *Roger* was convicted, as by the record, and proceedings thereof, remaining in the said court of the bench aforesaid, at *Westminster* aforesaid, more fully appears; which said judgment still remains in its full force, strength, and effect, not in the least reversed, set aside, paid off, annulled, satisfied, or discharged; and this he is ready to verify by the said record; wherefore he prays judgment, if the said *C.* ought to have or maintain his aforesaid action thereof against him, &c. *J. Morgan.*

The like plea of
a judgment reco-
vered in debt.

And the said *J.* and *W.* by *I. T.* their attorney, come and defend the wrong and injury, when, &c. and say, that

that the said *W.* ought not to have his aforesaid action thereof maintained against them, because they say, that the said *W.* heretofore, to wit, in term, in the year of the reign of his present majesty, impleaded the said *J.* and *W.* in his majesty's court before Sir *James Eyre* Knight, and his companions, then his majesty's justices of the bench, at *Westminster* in the county of *Middlesex*, in a certain plea of debt, for 800*l.* of and upon the said identical writing obligatory in the said declaration mentioned; and such proceedings were thereon had, in the said court of the bench aforesaid, in that plea; that the said *W.* afterwards, to wit, in that same term, in the year aforesaid, by the consideration and judgment of that court, recovered in the said plea, against the said *J.* and *W.* his debt aforesaid, and also 5*l.* which in the said court of the bench aforesaid, were adjudged to him, for his damages which he had sustained, on occasion of the detaining of the said debt, whereof the said *J.* and *W.* were convicted, as by the record, and proceedings thereof, still remaining in the said court of the bench aforesaid, at *Westminster* aforesaid, more fully appears, which said judgment still remains in its full force, strength, and effect, not in the least reversed, set aside, paid off, satisfied, or discharged; and this they the said *J.* and *W.* are ready to verify, by the said record; wherefore they pray judgment, if the said *W.* ought to have his aforesaid action thereof maintained against them, &c.

J. Morgan.

If an action be brought in this court, on a judgment recovered in C. P. and defendant plead *nul tiel record*, there must be a *certiorari* issue from this court, to the court of common pleas, to certify the record; this court cannot order the proper officer of the common pleas to attend with it. 2 *Burr.* 1034. *Hewson v. Brown.*

Issue on nul tiel record.

So if debt be brought on a judgment in an inferior court in K. B. and *nul tiel record* pleaded, there shall be a *certiorari* to the proper officer to certify. *Bro. V. M.* 244. If it be on a recovery in a *county palatine*, there shall be a writ to the chamberlain to certify. *Gliff.* 148. But if debt be brought in the C. P. on a judgment in the king's bench, and defendant plead *nul tiel record*, there must be a *certiorari* out of the

So if debt brought on a judgment in an inferior court.

court of chancery to send the record thither, which may be sent into the C. B. by *mittimus*. *Cro. Car.* 297. *Lutterell v. Lea*.

Plea of non assumpsit, and plene administravit.

And the said *James*, by *J. M.* his attorney, comes and defends the wrong and injury, when, &c. and says, That the said *B. C.* in his lifetime did not undertake or promise, in manner and form as the said *John* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in this behalf, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said *James* says, that the said *John* ought not to have or maintain his aforesaid action thereof against him, because he says, that he hath fully administered all and singular the goods and chattels, which were of the said *B. C.* deceased, at the time of his death, and which have ever come to or been in his hands to be administered, to wit, at *London* aforesaid, &c.; and that he the said *James* hath not, nor, on the day of exhibiting the bill of the said *John*, or at any time since, had any goods or chattels which were of the said *B.* at the time of his death, in the hands of him the said *James* to be administered; and this he the said *James* is ready to verify; wherefore he prays judgment, if the said *John* ought to have or maintain his aforesaid action thereof against him, &c. *H. Ruffel.*

Plea of bankruptcy in the defendant.

Says that the said *A.* ought not to have or maintain his aforesaid action thereof against him, because he says that he the said *C.* after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting the bill of the said *A.* to wit, on the -- day of --, in the year of our Lord 1796, at *London* aforesaid, &c. became a bankrupt within the intent and meaning of the several statutes concerning bankrupts; and that the several causes of action aforesaid, in the said declaration mentioned, accrued, and each and every of them did accrue to the said *A. B.* before such time as he the said *C.* so became a bankrupt, to wit, at *London* aforesaid, &c. and of this he puts himself upon the country, &c.

This plea need not be signed by counsel, because not a special plea. *Leigh qui tam v Monteiro*, 6 Term Rep. 496. and of course need not be filed.

By

By *stat. 5 Geo. 2. c. 30. s. 7.* The bankrupt may plead this plea generally; and it must conclude to the country. *Vide 1 Peere W. 249. 10 Mod. 160.*

If a judgment or matter of record of the same court be pleaded, the party pleading the same must on demand give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed, or in default thereof the plea is not to be received. *N. on R. Trin. 5 and 6 Geo. 2. Vide Carth. 453. 517.* for motion that the plea may be rejected.

If a judgement, &c. be pleaded of same court.

Of moving to abide by Plea.

If the defendant plead a special plea, as a judgment recovered in another court for the same cause, or such a plea as you think he will not abide by, you may move the court for him to stand by such plea, or plead such other *instantly* as he will stand by, which is done by *motion in court*; if to plead on the morrow, that may be done by a counsel's hand being signed; take the latter to the clerk of the rules, (the former is handed up in court,) in either case he draws up the rule, pay him 5s. counsel 10s. 6d. make copy, and leave it with defendant's attorney, or at his house.

When the court doth order one to plead *forthwith*, he shall plead in such convenient time after as the court shall judge reasonable; but if it be *instantly*, then he must plead the *same day*. *2 Lill. P. R. 372.* It is now settled to be *within 24 hours* after rule served. *Price v. Hodgson, E. T. 35 Geo. 3.*

When to plead.

A judge at his chamber, in *vacation time*, may make an order, that the defendant shall plead such a plea as he will stand by. *2 Burr. 781. Foster v. Shaw.*

If it be towards the *end of the term* (that the plaintiff may have sufficient time to give notice of trial), the court will order the defendant, if he will not abide by his plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired: and the practice is the same with regard to frivolous demurrers. *N. on Rule T. 5 & 6 Geo. 2.*

In case of a dilatory plea or frivolous demurrer, the court will order defendant to stand by it, or plead *instantly*.

If a plea has been pleaded, and the plaintiff obtains a rule or order of a judge, that he plead such other as the defendant will abide by, the defendant may either stand by the plea pleaded, or plead such other within the time limited by such rule or order, but he can only

If he plead a new plea, it can only be the general issue and a set-off.

plead the general issue and a set-off after such rule or order. *Hare v. Lloyd*, 1 *Term Rep.* 693.

The costs of this motion are allowed, whether the defendant plead a-new or not. I have this from the master.

Of striking out Special Plea, waiving and adding Pleas.

When the paper book is delivered to defendant's attorney, he may, (unless the rule for abiding by his plea be obtained previous,) within the time limited by the rule for the return, strike out the special plea, and plead the general issue; or, if the defendant demur specially, and the book be made up, he may, within the time, strike that out, and plead the general issue.

Cannot waive the general issue or general demurrer. But if special he may.

The defendant cannot *waive the general issue*, and instead thereof give a *special plea* or *demurrer*, nor can he *waive a general demurrer*, and give a *special demurrer* or *special plea*. *N. on R. T.* 5 & 6 *Geo.* 2. 2 *Str.* 960. *Law v. Law*. But if a *special plea* or *special demurrer* be given in, and the book is made up, and delivered to the defendant's attorney, he may strike out the *special plea* or *demurrer*, and return it with the *general issue*, or *general demurrer*. *Ibid.* And though he is tied down by a rule of court, or an order to plead issuably, and take short notice of trial, and the plaintiff replies, yet he may demur to the replication, if there is *good cause* without breach of the rule or order, but not otherwise. *Str.* 1185. *Dewey v. Sopp*.

And may demur to the replication.

If general issue be pleaded by mistake.

But if the *general issue* be pleaded by *mistake*, the court, on affidavit of facts, will permit defendant to withdraw it, and plead a justification. 1 *Wils.* 254. *So in C. P. Barn.* 346. 2 *Wils.* 204. 1 *Black. Rep.* 357.

If without notice of set-off.

If the *general issue* be pleaded by mistake, *without* a notice of set-off, the court will give leave to withdraw such plea, and order it to be delivered again, with the notice of set-off. 2 *Str.* 1267. *Blackburn v. Matthias*.

A plea may with leave be added.

Leave has been given to add a plea after issue joined, though two terms have elapsed. 1 *Wils.* 223. *Waters v. Bovell*.

If rule to abide by plea.

If a rule be served to abide by plea, the defendant can only plead the *general issue*. 1 *Term Rep.* 693. to which he may add a *notice of set-off*. 694. *Cockran v. Robertson*.

It seems there have been many instances of leave being given to *withdraw* plea pleaded, and replead with a justification, where the court can prevent the plaintiff from suffering any inconvenience by it, as by obliging the defendant to take short notice of trial, and if there be a verdict for the plaintiff to let him have judgment of the term. *Per Cur. Taylor v. Joddrell, 1 Wils. 254.*

If plea be withdrawn.

Leave was given to withdraw *non est factum*, and to plead the statute of gaming, the attorney conceiving the statute might be given in evidence on the *non est factum*. *Jefferys v. Walter, 1 Wils. 177.*

Stat. of gaming.

Nil debet pleaded, and after demurrer, leave was given to withdraw it, and plead it again with a *special plea*. *Meard v. Philips, 2 Str. 906.*

General issue waived and allowed to plead double.

Nil debet pleaded to a bond for performance of covenants, after joinder in demurrer, on defendant's consenting to put plaintiff in same condition as if he had pleaded right at first, court permitted him to waive his plea, and plead performance of covenants. *Herbert v. Griffiths, 2 Str. 1181.*

Plea waived after joinder in demurrer.

A replication was permitted to be withdrawn, and leave given to reply *de novo* after six terms elapsed; the case was, that the plaintiff had (by mistake of former attorney) traversed a lease under which he himself claimed. *Alder v. Chip, 2 Burr. 755.* This was considered as an amendment to prevent the defacing and obliterating the roll.

Replication permitted to be withdrawn after six terms.

But court refused, after a voluntary nonsuit, to give plaintiff leave to reply *de novo*, that a *latitat* issued within six years. *Hutchinson v. Brice, 5 Burr. 2692.*

After voluntary nonsuit.

For more, see title *Amendment*.

Replication.

How to compel Plaintiff to reply, &c.

THERE is no time fixed upon for replying to the plea, &c. the party who is to do the act applies to the master for a special rule for that purpose, and if the plaintiff does not file his replication, &c. within the time limited, which is *four days exclusive after the service of the rule*, judgment of *nonpros* may be signed without a demand made of such replication, &c. as the service of the rule is deemed a demand of itself.

No time fixed for replying, &c.

If defendant neglect.

If the defendant on the other hand neglect to rejoin or rebut, when served with the rule, the plaintiff may sign his judgment on the expiration of the rule.

So if plaintiff neglect.

So if plaintiff does not surrejoin or surrebut within the time limited, the defendant may sign judgment of *nonpros*.

Sunday, &c.

Sunday, or any *holiday* on which the court doth not sit, if it be not *the last of those four days*, is to be reckoned a day within those rules. *N. on R. T. 1 Geo. 2.*

To compel plaintiff to reply.

To compel the party to *reply*, &c. get a rule from the master entered on the back of your last proceeding, *viz. plea, replication, &c.* take same to the clerk of the rules, whose clerk *enters it*; pay 1s. 10d. then serve copy on plaintiff's attorney, naming the cause, thus: "Doe v. Roe, Saturday, next after, &c. to reply, entered," If the replication, &c. is not filed or delivered, as the case happens (if special, at the clerk of the papers, if to a general plea, to the attorney), then when rule is expired, *sign judgment of nonpros*; for which see title *Nonpros*.

If four terms elapsed,

If a cause hath continued *four terms* without prosecution before issue joined, each party shall have a term's *notice* to reply, rejoin, &c. unless the cause hath been staid by injunction or privilege; and such *notice* must be given before the *essoign day*. 2 Str. 1164.

Notice.

The notice should be, *that you intend to proceed by giving a rule to reply, &c.* the rule is to be given by the master, the *day after the term is expired*, and to be entered with the clerk of the rules, *before service*.

Rule to reply, rejoin, &c. may be given at any time in term time, or within *sixteen days* after the term.

A replication was, by leave of the court, withdrawn six terms after filed. 2 Burr. 756. *Alder v. Chip.*

If you want time to reply, &c. you may have a summons for that purpose.

Rejoin.

Proceed in the same way to urge defendant to rejoin, plaintiff to surrejoin, and so on, until issue be joined.

If defendant does not rejoin.

If defendant do not rejoin, the plaintiff may strike out the previous pleadings, and enter judgment as for want of a plea; for it is considered as an abandonment of the plea. *Petrie v. Fitzroy*, 5 Term Rep. 152.

The case of *Thomson v. Ryal*, 4 Term Rep. 195. stated in Sell. 369. is on a *paper book*, and not on a *rule to reply*.—The four days to reply, &c. is *four days exclusive*,

clusee, and judgment cannot be signed till the afternoon of the fifth day after the rule served; as if served on the 6th, judgment cannot be signed till the 11th, in the afternoon.

Paper Books.

PAPER Books are the issues in law upon *special* Definition. *pleadings*, made up by the clerk of the papers, who is an officer appointed by the court for that purpose. And such clerk, in all copies of pleas and paper books by him made up, shall subscribe to such paper books *the names of the counsel* who have signed such plea, as well on the behalf of the plaintiff, as of the defendant; and that in all books to be delivered to the justices of this court, the names of the *counsel* who shall sign those pleadings, as well on the part of the plaintiff, as on the part of the defendant, shall be written under those books by the clerks or attornies who shall deliver those books. *R. E. 18 C. 2.*

In case of special pleading, the book must be delivered to defendant's attorney, and if returned, then, and not before, the issue upon the pleadings are joined; for then both parties are agreed on the determination of the matter in question. *Vide 2 Lill. Pract. Reg. 113.*

When the issue shall be said to be joined.

In what cases the attornies may make up the issue, *vide title Issue.*

Tuesdays and *Fridays* are called special paper days, because the court goes into the paper, before they enter upon motions. *Paper days.*

In all special pleadings where the plaintiff takes issue upon the defendant's pleading, or traverseth the same, or demurs, so as the defendant is not let in to alledge any new matter, there the plaintiff may make up the paper book without giving a rule with the secondary to rejoin, otherwise a rule must be given. *N. on Rule Trin. 1 Geo. 2.*

In what cases paper book may be made up, without giving a rule to rejoin.

Where the clerk of the papers made up the book on a replication to a plea of set-off, and which was delivered to defendant's attorney, who did *not return* same.—The plaintiff afterwards gave notice of trial, made up the record, and countermanded same.—The master disallowed the costs of the record and briefs, as also

As to costs, if defendant does not return book, and plaintiff does not sign judgment.

also the notice of trial, and said plaintiff should have signed his judgment for want of book being returned. —But had the plaintiff joined the issue on defendant's rejoinder, he might then have gone to trial, if he thought proper, instead of signing the judgment, and would have been allowed the costs.

How to proceed to make up the Book.

How to make up paper book, if the action be in case.

Payment of the book to clerk of the papers.

If a special plea be left in the office, that is, such a one as plaintiff can take issue on, make a copy of the declaration on unstamped paper, and carry it to the clerk of the papers *Symond's Inn*, who will, if the replication be of course, draw same, and make up the paper book forthwith; and give this rule thereon, "*Unless the defendant receives this paper book, and returns the same on (naming the day) to be enrolled, let a writ be made,*" which is *four days*, exclusive of the day you deliver it; pay him 8d. *per sheet* for the whole book, and 4d. *per sheet* for all the pleadings subsequent to the declaration, besides stamps, which book keep a copy of, and deliver to defendant's attorney; if his plea concludes to the country, and the plaintiff joins issue thereon, you may give notice of trial on the back of the paper book, on the delivery. If the defendant's attorney does not return it in time, (no payment for the pleadings is requisite,) sign judgment the same as if no plea had been delivered, and execute an inquiry; the same notice which was given for the trial shall serve for the inquiry; but give notice that such inquiry is to be executed on such a day, at such an hour and place; as for instance, "*at the sheriff's office, &c. between the hours of 10 and 12 in the forenoon.*" If he return the paper book, then proceed to trial as in other cases.

Judgment cannot be signed for non-payment of paper book.

The defendant did not pay for the paper book on a plea of *non assumpsit* and tender, plaintiff signed judgment.—Motion to set it aside. *Lord Kenyon*, We have had a conference with the judges of the C. P. and they all agree with us in thinking that the rule (*Hilary term, 35 Geo. 3.*) established here, and which has been adopted in that court, ought to be general. Rule absolute. *Fuller v. Osborne, 6 Term Rep. 477.* Vide for rule title *Issue*.

How

How to proceed on a Plea of Judgment recovered, in the Common Pleas.

If it be not an issue on which you can go to trial, viz. an issue on a replication of *nul tiel record*, to a plea of a judgment recovered, and the defendant returns the book without striking out any of the pleadings, get the master to give on the paper book "*a rule to produce the record*," which is a four day rule, enter it with the clerk of the rules, pay 1s. 10d. a copy of which is served on defendant's attorney; this done, enter all the proceedings on the roll exactly as they are in the paper book: first *entering the term*, then *warrants of attorney for plaintiff and defendant*, docket the same, carry it to the treasury chamber, and file it; on the day mentioned in the rule for defendant to produce the record, go to *Westminster*, bespeak the roll at the treasury to be brought into court, and give paper book to one of the criers, who will call defendant three times "*to produce the record or he will be condemned*." Pay in the whole 4s. 6d. The master marks on the side of the roll "*the defendant hath not produced the record*," which is signing the judgment, give notice of inquiry, and proceed to execution. But if it be in debt, a rule must be given for judgment, which expires in four days exclusive, sign judgment on a double half crown^a, bespeak the roll of Mr. *Edge*, to be brought to the master's, he will tax the costs and mark them on the roll, pay 3s. 6d. then sue out execution.

How to proceed on a plea of a judgment recovered in case, in another court.

If in debt.

^a The master will do this at Westminster in term.

How to proceed on the Return of the Book, and Demurrer filed.

If defendant returns the paper book, and indorses thereon "*that he has struck out the rejoinder*," (which he may do,) and left a demurrer in the office, take paper book to the clerk of the papers to have the demurrer and joinder added thereto, deliver the book again to the attorney (which is now called the demurrer book), and he must return the same in "*twenty-four hours*," or sign judgment, which is done as if no plea had been pleaded. But if he return the book in time, and pay for same, enter on the roll the term, warrants of attorney, and the memorandum as far as the cause of action; take it to the clerk of the judgments, he will enter it, then give a brief to counsel, with

How to proceed if defendant returns the paper book, and demurs to the replication.

On setting cause down for argument, the term and No. of the roll to be procured to the clerk of the papers, to shew you have made the entry at the judgment office.

with instructions to move for a *consilium*, (that is,) a day appointed to argue the demurrer, which is signed only, pay 10s. 6d. take the roll to the clerk of the papers, who will mark it "*read*," pay 1s. 6d. and he will sign his initials on counsel's brief; go to the clerk of the rules, give him the brief, and he will draw up the rule, pay him 4s. 6d. then return to the clerk of the papers, and he will set down the cause, pay 1s. Serve copy of rule on defendant's attorney. Then plaintiff's attorney proceeds to make two copies of the demurrer book for the chief justice and senior judge, and the defendant's attorney (may if he pleases, and which he usually does, *if for argument*.) makes two copies for the *two other* judges, (no stamps are requisite.) on brief paper. They are to be delivered by both parties *two days before argument*, pay the clerks 2s. each. If the defendant's attorney neglects to deliver his before eight in the evening (two days before argument), then the plaintiff's attorney delivers the *two* for him; and in this case *the defendant cannot be heard*. If there is an argument, a copy is to be made for counsel, see discretionary on each side; but if no argument, then the plaintiff's attorney having delivered the *four books* to the judges, delivers a copy also to his counsel, with a fee of one guinea *indorsed thereon, to move for judgment*, naming the day appointed for hearing, and informing him that the defendant has delivered no books; or putting on the brief. *No argument*. On the day appointed attend the court, and pay the criers four shillings. In the evening go to the clerk of the rules, draw up the rule for judgment, pay 4s. and if the action be in case, take a treble penny stamp paper, enter thereon the memorandum, and carry it to the clerk of the judgments, who will sign judgment thereon, pay him 6d. then give notice of executing a writ of inquiry, and proceed therein as under title *Judgment by Default*.

Draw up rule for judgment.

If in debt.

It the action be in debt, then stamp the rule for judgment with a double half crown, and proceed to tax the costs, first bespeak the roll from the treasury, *if carried in*, to be at the master's, if not, enter all the proceedings thereon yourself, and the master will mark the roll, pay 3s. 6d. then take out execution. No rule for judgment is given after argument on demurrer in debt, for the court will not suffer any one to tell them

them that the judgment they gave on mature deliberation is wrong. But otherwise in case of judgment by default; *Str. 425. Edwards v. Blunt.*

Special Notes respecting Paper Books.

Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given for the plaintiff on the demurrer, the same notice which was given for the trial of the issue on the paper book, shall serve for executing the writ of inquiry, but then the plaintiff ought to give notice of the hour and place of executing the inquiry. *N. on R. H. 8 Geo. 1.*

Upon the delivery of any paper book, wherein an issue is joined, and notice of trial given on the back of the book, if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. *N. on Rule Hil. 8 Geo. 1.*

If a paper book be made up and delivered in term time, or *within four days exclusive after the term*, with a rule given thereon, by the clerk of the papers, for bringing the same book to be enrolled, and defendant's attorney doth not, *within four days after the delivery thereof*, bring back the book, and join with the plaintiff in the special issue or demurrer made up, or waive his special plea, and give the general issue or demurrer to any special issue tendered, judgment may be signed and entered, as if no plea had been pleaded. *N. on R. Trin. 1 Geo. 2.*

It seems by the course of the office, the paper book in a cause in *London or Middlesex* cannot be made up with the usual four day rule to return it, *unless the same be made up and taken from the office within four days from the end of the term.* But I take it, if the defendant is under terms of taking short notice of trial for the adjournment day, and he delay filing his plea, he is bound to return the book so that the plaintiff may go to trial according to the terms of the order, although the rule be contrary.

The course of the office respecting making up the paper book in country causes is, that the book may be

Where plaintiff tenders an issue on defendant's plea, and notice of trial given, if defendant demurs, and judgment given, it shall serve for inquiry.

Notice of trial given for the special issue, shall (if waived) serve for notice of general issue.

When to return the paper book if it be made up and delivered in term, or in four days after.

In town causes.

Country causes.

be made up with the usual rule to return same at any time previous to the end of the assizes.

At assizes.

And if it be an issue to be tried at such assizes, the defendant's attorney shall deliver it back *within four days after the delivery*, and join in the *special issue*, or give the *general issue*, and take notice of trial, or else the plaintiff's attorney may sign judgment by default, as if the defendant had not pleaded. But in all cases, if the plaintiff's attorney accept the book after the limited time, he cannot sign judgment. *N. on R. T. 1 Geo. 2.*

On a rule to return the book within four days, if the defendant delay till the morning of the fifth day, the plaintiff may sign judgment.

The case of *Oxley v. Bridge* created much confusion in the practice, by the court's determining, that defendant had until the office opened to return the book, although the rule expired the preceding evening, by which the defendant got the term of the plaintiff. *Dougl. 67.* But in *Trin. term 1779*, it became the object of a second inquiry, and the case was this: Action on bond, plea, judgment recovered. Replication, *nul tiel record*, the book was delivered with the usual *four day rule*. The book was *not offered* to be returned till the morning of the fifth day before the opening of the office, when the plaintiff refused to receive it, and immediately signed judgment, and took out execution. Rule to set the proceedings aside for irregularity. The master certified, that strictly the plaintiff was entitled to sign judgment, *if the paper book was not returned on the evening of the fourth day*, although it is a very common indulgence to allow him till the next morning. Lord Mansfield was clear, that a judgment entered up agreeably to what the master had certified to be, *in strictness*, the practice of the court, could not be set aside for irregularity. *Rule discharged. Haselar v. Ansell. Dougl. Rep. 197.*

Same doctrine.

The rule expired *Saturday*, paper book not returned till the *Monday* morning before the opening of the office, when plaintiff refused to receive it, and immediately signed judgment: Court held the judgment regular. *Thomson v. Ryal, 4 Term Rep. 195.*

Book not delivered same night obtained from clerk of the papers.

The book very often is not delivered the same night the clerk of the papers delivers it out; in that case, the defendant has four days after delivery to deliver it back, *viz.* one day inclusive, the other exclusive; as if delivered the sixth, it must be re-delivered the tenth.

That

That in every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant to hinder the trial of the issue shall demur in law upon the replication or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant shall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper book as aforesaid. *R. Hil. 8 Geo. 1.*

Where the plaintiff concludes *ad patriam*, and defendant demurs, he shall accept notice of inquiry.

It is said in *N. on R. Trin. 1 Geo. 2.* if the paper book be of an issue in fact, the *four days* for keeping the book are accounted exclusive; if a demurrer, or issue in law, the *four days* are inclusive; but there is no such distinction; four days *exclusive* of the one day, and *including* the other, in both cases.

Rule to be four days exclusive.

Demurrer.

DEMURRER, in law, is a kind of pause or stop put to the proceeding of any action, upon some difficult point which must be determined by the court, before any further progress can be had in it. In every action, the controversy is either as to fact, or as to law; the first, decided by the jury; the second, by the judges. If the plaintiff's declaration be not sufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to it; if on the other hand the defendant's plea be invalid, the plaintiff may demur in law to the plea, and so on in every other part of the proceeding, and to try the issue, the other party joins in demurrer. For this purpose a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on record on a roll *of the term it is joined*, and copies thereof, called demurrer books, are delivered to the judges *two days* before the day of argument.

Definition.

By stat. 27 *El. c. 5.* after demurrer joined and entered in any action or suit, in any court of record, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration,

For these causes there must be a special demurrer.

claration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer.

So for these.

No advantage or exception shall be taken of or for an immaterial traverse, the default of entering pledges upon any bill or declaration, the default of alledging the profert in curia of any bond, bill, indenture, or other deed, mentioned in the declaration or other pleading, or of letters testamentary, or letters of administration; the omission of *vi et armis* or *contra pacem*, the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or not alledging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer, so as sufficient matter appear in the pleadings upon which the court may give judgment, according to the very right of the cause, though it might have been substance before the stat. of queen Eliz. 4 Ann. c. 16.

Since these statutes, the party on a general demurrer may take advantage of defects in substance, and therefore if the defects be not clearly of *that* nature, it is safest to demur specially; in which case, he may not only take advantage of such defects, but also of any others that are specially set down. *Tidd*, 443.

General or
special.

A demurrer is either *general* or *special*; *general* where no particular cause is alledged; *special*, when the particular object is pointed out, and insisted upon as the cause of demurrer; and that as a general demurrer *confesses all such matters of fact as are sufficiently pleaded*, *Hob.* 233. so he that demurs specially, can take no advantage of any *other matter of form* than what is expressed therein; but he may of any *other matter of substance*. *Co. Lit.* 72. 10 *Co.* 88.

A man who demurs *generally*, shall take advantage of all matters which are requisite to shew a good right or title in the plaintiff. *Plow. Com.* 6b. a. *Hob.* 301.

Three counts, if
one be good,
judgment.

If there be three counts to the declaration, to which there is a general demurrer, if any one of the counts be good, judgment must be for the plaintiff, if such count
can

can be joined with the other two. *The Duke of Bedford v. Alcock.* 1 *Wils.* 252.

But if a plea or replication which is intire be bad in part, it is bad for the whole. 1 *T. Rep.* 40. 3 *T. Rep.* 374. 1 *Salk.* 312.

Defendant cannot demur to a declaration, because it says he was *summoned*, instead of *attached*, without praying *oyer*. *Rep. Temp. Hard.* 189.

How to proceed to Argument.

To proceed to argument, get a roll, and enter warrants of attorney for plaintiff and defendant, then the whole proceedings thereon, *as delivered*; and of that term, docket it, take the same with a motion paper for a *concilium* (signed by counsel, fee 10s. 6d.) to the clerk of the papers, who will mark the roll "*read*;" pay him 1s. 6d.; and he also marks the brief: take same to the clerk of the rules, he will draw up the rule for argument, pay 4s. 6d.; then return to the clerk of the papers again, shew the rule, and he will enter the cause for argument, pay 1s. The rule for a *concilium* is to be served on the defendant's attorney. In case of argument, two copies of the demurrer book are to be made, and delivered to the judges *two days* prior to the day of argument by the plaintiff, one to the chief justice, the other to the *senior* judge; the defendant delivers also *two* to the other *two* judges, pay clerks 2s. each. The plaintiff, if defendant does not deliver his books over by eight in the evening *two days before* argument, may deliver the other *two* for him. *R. M.* 17 *Car.* 1. *N. on R. E.* 2 *Jac.* 2. If defendant neglects to deliver the books to the judges in time, he cannot now be heard.

Previous to the day of argument, give brief to counsel with what fee may be thought proper, but if no argument, one guinea, who will move for judgment; pay clerks 4s.

N. B. Formerly the books were to be delivered *four days* before argument. *R. E.* 2 *Jac.* 2.

In the evening go to the clerk of the rules, who will draw up the rule for judgment, pay 4s.; and if the action be *in debt*, stamp it with a double half-crown stamp, then proceed to tax the costs; if the roll is carried in, bespeak it first of Mr. *Edge*, to be brought to the master; if not, enter the final judgment

ment thereon, and take it with you; pay the master 3s. 6d. for taxing the costs, then take out execution. *In debt*, no rule for judgment is given.

If in case.

If the action be in *case*, and judgment for the plaintiff, the master marks on the roll "judgment for the plaintiff;" draw up the rule, then give notice of inquiry, and proceed as in other cases of judgment by default.

Causes for argument, when to be entered and argued.

Ordered, that all *special causes* to be set down by the clerk of the papers, shall be *entered* at least *four days*, *exclusive of the day of argument*; of which *notice* shall forthwith be given to the attorney or agent on the other side (*contra* 2 Str. 1242.); and to be argued in the order the same stand entered; and shall not be adjourned, unless the court for reasonable cause, verified by affidavit, upon application to be made by either of the said parties, their attorney or agent, at least *two days before the day of argument*, otherwise order; that all such causes remaining undetermined at the end of any term, shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on the next *term* in the order and course the same stand. *R. M.* 30 Geo. 2.

Paper days.

Tuesdays and *Fridays* are *special paper days*, because the court goes into the paper before they enter into motions.

On a general demurrer, the plaintiff's attorney may make up book.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer book himself, a copy of which he is to deliver to defendant's attorney.

Issue money. See Rule, 333.

It is now determined that the *R. H.* 35 Geo. 3. respecting the not paying the issue money, not only extends to general issues, but all special issues, paper books, and demurrer books. *Fuller v. Osborn*, 6 Term Rep. 477.

General demurrer to be signed.

A *general demurrer* must be *signed* by *counsel*, or plaintiff may sign judgment^a.

Cannot waive general issue and give special plea.

The defendant cannot waive the general issue, and instead thereof give a special plea or demurrer,

^a The *concilium*, *dies concilii*, or day to hear the counsel of both parties, was formerly moved for upon *reading* the record in court, but now it is a *haud motion*. 2 Lill. 421. And signing a *concilium* is considered as a step in the cause, so as to make it unnecessary to give a term's notice. 3 Term Rep. 530. *Bland v. Darley*.

nor waive a general demurrer and give a special demurrer or special plea. But if a special plea or special demurrer be given in, and the book is made up and delivered to the defendant's attorney, he may strike out the special plea or demurrer, and return it with the general issue or general demurrer. *N. on R. T.* 5 & 6 Geo. 2.

The defendant obtained time to plead, pleading *issuably*, and taking short notice of trial. The plaintiff demurred to the replication, and plaintiff made up the record, and tried the cause before demurrer heard. *Cur. said*, on motion to set aside the verdict, The construction of the terms put upon defendants, when they ask time to plead, is not to oblige them in all events to join issue to the country, but only where the replication offers a fair issue, and affords no reasonable cause for demurrer; now here the replication not shewing any *tender of a surrender*, does give such a color of objection as will warrant what the defendant hath done. *Dewey v. Sopp, Str.* 1185.

Non assumpsit to three counts, demurrer to the 4th: after judgment on the demurrer, plaintiff takes out a writ of inquiry and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted that the plaintiff ought to take out a venire, *tam* to try the issue, *quam* to inquire of the damages upon the demurrer. *Sed per curiam*, That is indeed the course where the issues are carried down to trial before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment on inquiry must stand. *Fleming v. Langston.* 1 Str. 532. 574.

Easter Term, in, &c.

London, (fs.) Be it remembered, that on *Wednesday* next after fifteen days of *Easter*, in this same term, before our lord the king at *Westminster* comes *A. B.* by *I. T.* his attorney, and brings into the court of our said lord the king, before the king himself, now here

The defendant is not bound by a consent to re-join *gratis*, if the replication affords cause of demurrer.

Where there are issues in fact, and in law, the plaintiff may waive the issues, and take out an inquiry upon the demurrer.

A general demurrer book by bill, where the demurrer is to the declaration.

his certain bill against *C. D.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *London, (ss.)* (to the end of the declaration), suit, &c.

General demur-
rer to declara-
tion.

And the said *C.* by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and saith, That the said declaration, and the matters therein contained, are not sufficient in law for the said *A.* to have or maintain his said action against the said *C.* to which said declaration the said *C.* hath no need, nor is he obliged by the law of the land to answer; wherefore, for want of a sufficient declaration in this behalf, the said *C.* prays judgment, and that the said *A.* may be barred from having and maintaining his aforesaid action thereof against him, &c. *J. M.*

Joinder.

And the said *A.* says, that the declaration aforesaid, and the matters therein contained, are sufficient in law for the said *A.* to have his aforesaid action thereof maintained against the said *C.* which said declaration, and the matters therein contained, the said *A.* is ready to verify, and prove as the court shall award; and because the said *C.* hath not answered the said declaration, nor in any wise denied the same, the said *A.* prays judgment, and his damages by occasion thereof, to be adjudged to him, &c.; but because the court of our said lord the king now here, is not yet advised what judgment to give of and concerning the premises, a day is given to the said parties, that they be before the lord the king at *Westminster*, on next after

No occasion to
fill this up.

to hear their judgment thereon, for that the court of our said lord the king now here, is not yet advised thereof, &c.

Demurrer to a
plea.

And the said *A.* as to the said plea of the said *C.* by him above pleaded, says, that the plea aforesaid, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law for the said *C.* to bar the said *A.* from having or maintaining his aforesaid action thereof against him the said *C.* and that the said *A.* is not under any necessity, nor is he bound by the law of the land in any manner to answer thereto, and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said *A.* prays

A. prays judgment, and his damages by reason of the premises to be adjudged to him, &c. *J. B.*

The judgment for the plaintiff on demurrer to a plea or replication in abatement, is not final, but only a *respondeas ouster*. 1 *Lord Raym.* 531. In other cases, it is interlocutory, or final; if the action be in case, it is interlocutory; if in debt, it is final.

Judgment in abatement.

In other cases.

And the said *C.* as to the said plea of the said *A.* by him above in reply pleaded to the said plea of the said *C.* and the matters therein contained, are not sufficient in law for the said *A.* to have or maintain his aforesaid action thereof against him the said *C.* and that he the said *C.* is not under any necessity, nor is he bound by the law of the land in any manner to answer the same, and this he the said *C.* is ready to verify; wherefore, as before, he prays judgment, and that the said *A.* may be barred from having and maintaining his aforesaid action thereof against him, &c. And for causes of demurrer in law, according to the form of the statute in that case made and provided, the said *C.* sets down and shews to the court here the following causes, to wit, (here set forth the causes). The causes must be expressed in what particular. *Hob.* 232.

Demurrer to the replication.

Causes assigned.

Leave has been given after argument on demurrer, to amend the declaration, where the declaration was demurred to. *Luxton v. Robinson, Dougl.* 620.

Amendment after demurrer argued.

Leave was given to defendant, after argument, to withdraw the demurrer, and take issue on the replication. *Howell v. Mac-Ivers, 4 Term Rep.* 690. So, after argument and before judgment pronounced, may have leave to amend. *Str.* 954.

Withdraw demurrer.

2 *Wils.* 173. S. P.

If there is a demurrer to the plea, in which the point has not been settled, but which the court determines to be good, they will permit plaintiff to withdraw the demurrer, and to reply. *Collins v. Collins, 2 Burr.* 820.

Withdrawing demurrer.

The causes assigned on demurrers ought not to be involved in general expressions of *double, negative pregnant, uncertain, want of form, &c.* but *specially shewn*, that the other side may join in demurrer, amend paying costs, or discontinue. *Mills, 29. R. M.* 1654. *sect.* 17.

Causes of demurrer to be specially assigned.

A plea may be bad on a general demurrer, though it might be helped after verdict, as *nil debet* to an action on bond. 2 *Wils.* 10. *Anon.*

Plea.

The statutes do not extend to demurrers to pleas in abatement. 1 *Barn.* 11. *Com.* 309.

Duplicity is still aided on a general demurrer. *Com.* 115.

Leave to amend
before trial of
the issues, not
after.

Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; but not after the *verdict found* on the issues upon facts, and contingent damages found upon the demurrers, of which there never was an instance. *Mr. J. Denison. Robinson v. Rayley, 1 Burr. 322.*

Departure has been held to be within the stat. 4 & 5 *Ann.* and demurrer must be special. *T. Ray. 86.*

How to make up Demurrer Book on a Special Demurrer.

Deliver a copy of the declaration to the clerk of the papers, who makes up the paper book, and gives a *four day rule* in the margin, to receive and return the book.

If defendant's attorney return the book in time, then enter the proceedings on the roll, and proceed as in page 323.

If there be an
issue as to part,
and a demurrer
to the other part,
you may try the
issue first.

If there be an issue as to part, and a demurrer as to the other part, you may try the cause before you argue the demurrer, or argue the demurrer before trial; in the latter case enter all the proceedings on the roll as in the paper book, and proceed to argument the same as if there was no issue in fact, as that is to be tried afterwards.

If plaintiff re-
fuses to join in
demurrer, how
to compel him.

If plaintiff refuses to join in demurrer, get a rule from the master for that purpose, enter it with the clerk of the rules, and serve it; if he does not join in demurrer when the rule expires, sign a *nonpros*.

Plaintiff to de-
liver the demur-
rer books to
chief and senior
judge, the de-
fendant the other
two.

By the rule *M. 17 Car. 1.* the books, immediately after reading of the record, ought to be delivered to the *chief justice* and *senior justice* by the plaintiff or his attorney, and to the *other justices* by the defendant or his attorney; and if one party neglect to deliver the books in form aforesaid, then the other party or his attorney ought to deliver such books omitted, at the cost of the party who shall so neglect, before any argument in that case shall be made at the bar by counsel.

Books to be de-
livered anciently
four days, now
two days.

It is ordered, that upon reading of any record here in court, upon a *demurrer* in law, special verdict, or writ of error, the books shall be delivered to the justices by the

the attornies of both parties, by the space of *four* days before the day appointed; and that the exceptions which shall be insisted on, upon the argument, shall be marked in the margin of those books. *R. E. 2 Jac. 2.* The practice hath been to deliver the books *only two days* before the day appointed for the argument. *N. on said Rule.*

Not now done.

When the Book may be made up by the Defendant.

It is ordered, that if any plaintiff here in court shall demur in law to any plea, rejoinder, or rebutter, by any defendant here in court exhibited, and such defendant joins in such demurrer in law; that then the attorney for the plaintiff shall enter of record such demurrer in law, and in default thereof, upon a rule given by the secondary of this court for entering of such demurrer in law, the attorney for the defendant shall enter of record such demurrer. *R. E. 11 W. 3.*

Where the defendant's attorney may enter the plaintiff's demurrer upon record.

If the plaintiff demurs or takes issue on the defendant's plea, rejoinder, or rebutter, and the defendant joins therein, and the plaintiff will not make up the book and enter it on record (having made a default), then the defendant may, pursuant to this rule, make up the book and enter it; and when he has made up same, deliver it to the plaintiff's attorney, because the plaintiff may perhaps enter the issue, as he has a right to do, at any time before the expiration of the above-mentioned rule given by the secondary, which rule ought to be served on the plaintiff at the same time the book is delivered to him. If the plaintiff does not enter the issue, the defendant may, at the expiration of the rule, and give notice of trial by proviso. *N. on the above Rule.*

As to the payment for the pleadings, vide the new rule, Hil. 35 Geo. 3.

N. B. By the above rule, the book cannot be made up by the defendant until default made by the plaintiff; then make up the paper book, apply to the master for a rule, which he gives on the book or on a separate piece of paper, that "*unless the plaintiff enters the issue*" on record on *next after* let the same "*be entered on the part of the defendant.*" Enter it at the clerk of the rules, pay 1s. 10d. serve copy at the time you deliver the book.

Issue.

Of making up the Issue.

N. on R. T.
12 W. 3.

EVERY clerk or attorney of the king's bench may, according to the ancient rules of the court, make up the issue and demurrer books in the following cases, viz. Every issue that may be given on the book side.

Not guilty to a new assignment in trespass, the bar of son frank tenement, comperuit ad diem to a bail-bond, nul tiel record to an action of debt on a judgment, a general demurrer to a declaration, in covenant where the defendant tenders an issue to the country; every special non est factum; every son assault demesne; and likewise all issues and demurrers upon every writ of error, scire facias, and audita querela: And all repleaders, or other things formerly entered of record. In other cases, both by bill and original, the special pleadings are to be left with the clerk of the papers, who makes copies thereof, and where issue is joined, the paper books are made up by him.

Before the new rule of *Hil. 33 Geo. 3.* was made, if an issue was delivered *and paid for*, the issue was joined, so that the plaintiff could go to trial: But now, if the defendant's attorney accept the issue, and do not give notice forthwith, that the plaintiff may sign judgment, I conceive the plaintiff will then be at liberty to go to trial. *Vide 2 Lill. Pr. Reg. 113.*

Of making up the issue on a general plea of *non assumpsit*; or not guilty, &c. where the declaration and plea are of the same term.

Easter term, in the 36th year of the reign of king George the third.

The form of an
issue by bill.

As the action
is. It is debt
(say so) trespass
and assault (tres-
pass.)

London, } Be it remembered, that on Wednesday next
to wit. } after 15 days from the day of Easter,
this same term, before our lord the king at Westminster comes John Denn, by Richard Pack his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against Richard Fenn, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case^a, and there are pledges for the prosecution, to wit, John

Do

Doe and *Richard Roe*; which said bill follows in these words, to wit, *London, (ss.) John Denn* complains (to the end of the declaration), suit, &c. then on a new line enter the plea.

And the said *Richard*, by *A. B.* his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not undertake and promise in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself upon the country; and the said *John Denn* doth the like, &c. Therefore, let a jury thereupon come before our lord the king at *Westminster*, on^a next after by whom, &c. and who neither, &c. because as well, &c. the same day is given to the parties aforesaid, at the same place.

If plaintiff delivers the issue book to defendant, and the papers are afterwards *mis*laid, the court will order the defendant to give him a copy of the issue. *Wiar v. Smith, Str. 414.* to enter it by.

If the declaration be stated of a *particular day* of the term, the memorandum to the issue must state *the same day*, which is generally the day after the cause of action arose. And where a tender is pleaded, and plaintiff puts a *general* memorandum of the term, the defendant may apply by summons to have the memorandum altered to the *right day*^b. 1 *Str. 638. Smith v. Key. 1 Ld. Ray. 683. Carth. 354.*

Issue may be amended after verdict, although the *similiter* was not joined by adding it. *Cowp. 408. Sayer v. Pocock.* Formerly held not amendable. *Str. 641. 8 Mod. 376.*

How to make up Issue where the Declaration and Plea are of different Terms.

Trinity term, in the 36th year of the reign of king George the third.

Middlesex, } *Be it remembered, that in Easter*
to wit, } term^c last past, before our lord the
king at *Westminster* came *John Denn*, by *Richard*

^a The last day of the term, if your cause is tried the sittings after; if in term, the first day of the term. If in the country, the last day of term.

^b The reason for a memorandum is, that proceedings by *bill* were formerly considered as the by business of the court. *Gilb. C. P. 47.*

^c The term the declaration is of.

Pack his attorney, and brought into the court of our said lord the king, before the king himself then there, his certain bill against *Richard Penn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass and assault, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, (to the end of the declaration,) suit, &c.

Imparlance.

^a The first day of the term in which the issue is made up.

And now at this day, (that is to say,) on *Friday* next after the morrow of the holy *Trinity* in this same term^a, until which day the said *Richard* has leave to imparl to the said bill, and then to answer the same, &c. at which day before our said lord the king at *Westminster*, comes as well the said *John*, by his said attorney, as the said *Richard*, by *A. B.* his attorney; and the said *Richard* defends the wrong and injury, when, &c. and says, that he is not guilty of the premises above laid to his charge, in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself upon the country, and the said *John* doth the like, &c. therefore let a jury thereupon come, &c. (as in the other).

If plea of 2 or 3 terms subsequent to declaration.

Enter only one *imparlance*, if the plea be of two or three terms subsequent to the declaration; as for instance, declaration of *Michaelmas* term, 36 *Geo.* 3. plea of *Easter*, and you try the cause of *Trinity*; imparl over to the first day of *Trinity*, and make up your *issue* as of that term, as the want of a continuance day cannot be assigned for error in this case. *Vide stat. of Jeof. 32 H. 8. c. 30. 4 & 5 Ann. c. 16.*

Where there are two or more issues.

Where there are two or more *issues* taken upon the defendant's plea, then after the tender of the last *issue*, "and of this he puts himself upon the country, and the said plaintiff doth the like," add this, "Therefore as well to try this *issue* as the said other *issue* above joined, let a jury thereupon come before our lord the king at *Westminster*, on

next after
by whom, &c. and who neither, &c.
"to recognize, &c. because as well, &c. the same day
"is given to the parties aforesaid, at the same place."

Too late to object to plea roll after defendant has paid for issue.

After trial, in arrest of judgment, it was objected, that the plea roll contained only the declaration, and the plea of *nil debet*; whereas, there was a plea in abatement which had been demurred to, and a *respondens*
ouster

causer awarded, no judgment upon it was entered on the roll before *nil debet* pleaded; Court held this irregularity cured by the defendant's accepting the issue and paying for it. His objection ought to have been made at that time; it is too late to make it now. Rule discharged. *Combe v. Pitt*, 3 Burr. 1683.

Declaration stated bond 6th Jan. 1728, plea *non est factum*; in the issue, bond stated 1738, issue received and paid for. Record was 1728, no defence—Verdict. Motion to set it aside as varying from the issue delivered, Court refused, saying defendant's plea was not altered by it, the issue being whether he executed a bond in 1728. Besides he should have refused the issue, if not agreeable to declaration. *Shepley v. March*, 2 Str. 1131.

Record agrees with declaration, variance from issue not material.

How to make up an Issue against two Defendants, where one lets Judgment go by Default, and the other pleads.

To the end of the defendant's plea, then join issue, and the said *A. B.* doth the like: then go on thus: And the said *E.* in his own person comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *E.* for which the said *A.* ought to recover his damages by occasion of the premises; but because it is unknown to the court here, what damages the said *A.* hath sustained by means thereof; and because it is also at present unknown to the court here, whether the said *C. D.* will be convicted of the premises upon which the above issue is joined, between the said *A.* and the said *C.* or not; and because it is necessary and convenient that there be but one taxation of damages in this suit; therefore, let the giving of judgment in this behalf against the said *E.* be stayed, until the said issue between the said *A.* and *C.* be determined; and as well to try the issue above joined between the said *A.* and *C.* as to inquire against the said *E.* what damages the said *A.* hath sustained in this behalf, let a jury thereupon come before our lord the king at *Westminster*, on next after by whom, &c. and who neither, &c. because as well, &c.

Issue against two defendants.

Unica taxatio.

ISSUE.

¶ the same day is given to the said *A.* and *C.* at the same place.

The notice of trial.

In this case the defendant who lets judgment go by default, must have notice of the trial of the issue and assessment of the damages, which may be thus: "Take notice, that the issue joined in this cause between the above-named plaintiff, and the above named *C.* will be tried at the next assizes, to be held at *W.* in and for the county of *W.* and that at the same time the damages will be assessed by the same jury against you in this cause, upon the judgment taken by default. Dated," &c.

Issue in county palatine.

When the issue is in a *county palatine*, where the king's writs do not run, and must be tried by a jury of the palatinate, the record is sent down by *mittimus* to the judges to be tried; and the award of the *venue* and *mittimus* are in the following form, with a suggestion at the beginning:

Therefore let a jury be made thereof, and because the said issue between the parties aforesaid, ought to be tried by men of the county palatine of *Lancaster*, to wit, of the body of the said county where the writ of our said lord the king doth not run, and not elsewhere; therefore to try the issue between the parties aforesaid above joined, let the record of the plaint aforesaid be sent to his majesty's justices of the said county palatine of *Lancaster*, so that the same justices, by his said majesty's writ of that county, to be duly made out, and to the sheriff of the same county directed, do command the same sheriff, that he cause twelve good and lawful men, of the body of the said county of *Lancaster*, to come before the said justices, at their next general sessions of assize to be holden for the said county, after the said record shall be delivered to them, each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. and when the verification and issue aforesaid shall be there made and tried, that then the said justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon before them, in his said majesty's court there, to our said lord the king at *Westminster*, at a certain day, which the said justices shall appoint the said parties to be in the same court, there to hear judgment thereupon.

If

If it is a *Welsh* issue, to be tried in the next *English* county, the award of the *venire* is thus:

Welsh issue, if to be tried in next *English* county.

And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next *English* county to the said county of *Carmarthen*, and not elsewhere; and because the county of *Hereford* is the next *English* county to the said county of *Carmarthen*; therefore let a jury of the said county of *Hereford*; &c. come before our lord the king at *Westminster*, on next after who neither, &c. to recognize, &c. The same day is given to the said parties there, &c.

N. B. In a *Welsh* issue, when tried in the next *English* county, the *jurata*, *venire*, and *disfringas*, are made up of the next *English* county into which the *venue* is awarded, as if the *venue* were laid in that county.

In this method of entering the suggestion, the *venue* remains, and the court only award the *venue* to the next adjoining county. 3 *Burr* 1334.

If the sheriffs are parties to the suit, enter to the end of the *similiter*, then say: And because it is suggested to the court of our lord the king, now here, that the said *A. B.* and *C. D.* are sheriffs of the city of *London*, it is therefore commanded to the coroner, that he cause to come before our lord the king at *Westminster*, on next after twelve, &c. *N. B.* The *venire* and *disfringas* are directed to and returned by the coroner, pay him 4s. 4d. if common; if special, 8s. 8d.

Issue where sheriffs are parties.

If only one of the sheriffs is party, then it may be directed to the other.

If the coroner as well as the sheriff is a party, or interested, the *venire* and *disfringas* are to be directed to elisors, *Barnes*, 465.; and after they are appointed, a special jury may be moved for.—I should think if sheriff and coroner be interested only, or of kin to either of the parties, this must appear to the court by affidavit; and motion on affidavit is to be made; but if the sheriff is party to the suit, the *venire* is awarded to the coroner as a matter of course; for the suggestion. Vide *Crompton*, 242.

These issues are to be ingrossed on treble penny paper.

How to be ingrossed.

And now it is ordered, that no judgment shall be signed for non-payment of the issue money, but that the issue money shall remain to be taxed as part of the costs in the cause. *R. H.* 35 *Geo.* 3. formerly otherwise, *R. T.*

Judgment not to be signed for non-payment of issue.

Plaintiff does not waive his right to sign judgment for not paying the issue money, by giving notice of trial after demanding it.

R. T. 12 W. 3. This rule extends to paper books, and demurrer books, p. 322.

Before this rule was made, the plaintiff's attorney delivered the issue with notice of trial, and countermanded it, afterwards he demanded the issue money, but it was not paid, and interlocutory judgment was then signed. *Motion to set it aside.* Buller J. The plaintiff cannot sign judgment without demanding the issue money; but by delivering notice of trial, he does not waive his right to receive it. In this case there was a demand of the issue money, and therefore the judgment is not irregular. *Rule discharged.* *Jones v. Bryant*, 5 Term Rep. 400. *M. 34 Geo. 3.*

How to compel the Entry of the Issue.

If the plaintiff's attorney delays to enter the issue, get a rule from the master, on the back of the issue delivered, enter it with the clerk of the rules, pay 1s. 10d. and serve plaintiff's attorney with a copy, naming the cause thus: *Denn v. Fenn, Friday next after, &c. to enter the issue.* Entered, and he must, before the rule is out, *enter the issue on record (the roll) and file same in the treasury, or a nonpros may be signed,* and the issue must be *entered the term it is joined.*

But if plaintiff wants time, he may apply to a judge for a summons, who will grant him a reasonable time to enter the issue.

Cannot give a rule same term issue is joined, to enter issue, unless, &c.

If the action be laid in *London* or *Middlesex*, defendant ought not to give a rule to enter the issue the same term the issue is joined, *unless notice of trial hath been given*; and, *in a country cause*, plaintiff is no ways bound to enter his issue the same term; therefore you cannot have a rule for that purpose till the next term. *N. on R. M. 4 Ann.*

Must enter the issue within the time allowed by the rule.

The plaintiff must enter his issue if the action be laid in *London* or *Middlesex*, and bring the record into the office *within four days after notice of the rule*; if in the country, before the *continuance day of that term*, or a *nonpros* may be signed and entered. *N. on Rule M. 4 Ann.*

If roll be brought in any time before judgment, it will do.

But if defendant does not sign the *nonpros*, the plaintiff may bring in his roll any time before judgment is actually signed, as in case of a plea; for although he has searched after rule expired, he is bound again to make

make the search before he signs his judgment. *Minns v. Baster*, 2 Term Rep. 16. I take it the case of the return of a paper book, has nothing to do with this rule, though Mr. Sellon seems to think it has. *Vide his Book*, 404.

It is ordered, that no record of *nisi prius* shall be sealed or passed at the *nisi prius* office by the *custos brevium* of this court, or any clerk of that office, before the issue in that cause be fairly entered on record, or an *incipitur* thereof, and such entry, with the record of *nisi prius*, be first brought to, and signed by the secondary of this court, for which no fee shall be demanded or paid, but the usual and accustomed fee due to the chief clerk of this court for entry of such issue on record. R. M. 5 Ann.

No record to be sealed before issue be entered.

For the entry of the issue, vide *Docket*.

Notice of Trial.

IT is ordered that due notice be given to the defendant upon all trials at every assizes, when any cause shall be carried to trial, as well in old causes as in new causes; and likewise to the plaintiff in all causes, to be tried by proviso as well in *London* or *Middlesex*, as at the assizes. R. M. 1651.

Due notice of trial to be given in all causes.

So in all causes to be tried in *London* or *Middlesex*, previous to the sittings.

If in any cause to be tried in *London* or *Middlesex*, the defendant do live forty miles distant from *London*, the plaintiff or his attorney, by the rules of the court, ought to give defendant or his attorney 14 days notice of the trial before he try his cause, 2 Lill. P. R. 745. that the defendant be not surprized for want of sufficient time to get his witnesses to be at the trial; which 14 days is accounted a convenient time for the doing thereof.

If venue be in *London* or *Middlesex* and defendant live 40 miles.

By stat. 14 Geo. 2. c. 17. s. 4. it is enacted, That no cause whatsoever shall be tried at *nisi prius*, before any judge or justice of assize or *nisi prius*, or at the sittings in *London* or *Westminster*, where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial.

10 days notice of trial above 40 miles residence from *London*, at assizes.

As there are no negative words in the statute that there shall be no more than ten days, and as defendant was en-

Explanation of statute.

titled

titled to *fourteen* where the *venue* was laid in *London* or *Middlesex*, and he resided 40 miles from *London*, fourteen days notice must be given agreeable to the old practice. Vide *Barnes*, 305. *Bowles v. Jenkins*. But if the *venue* be laid in the *country*, then ten days notice at least is necessary.

3 days in London or Middlesex.

The practice is, if defendant lives *within forty miles of London*, eight days notice *exclusive* of the day, is to be given, (if the *venue* be laid in *London* or *Middlesex*,) one day *exclusive*, the other *inclusive*.

If any defendant lives above 40 miles.

It is said, if any of the defendants live above forty miles distant from *London*, the plaintiff by the rules of the court, ought to give him *fourteen days notice of trial*, *Sty. Prac. Reg.* 512. this (I take it) means where the *venue* is laid *there*: But in the case of *Perry v. Jackson*, Mr. Justice *Ashurst* says, that in construing another act, meaning 14 *Geo. 2. c. 17. s. 3.* which requires^a ten days notice of trial where defendant resides above forty miles from *London*, we have determined, *that if one of the defendants resides within that distance, so long a notice is not necessary.* 4 *Term Rep.* 519.

The defendant resided in India, 14 days.

The *venue* was in *London*, and the plaintiff having given eight days notice of trial, obtained a verdict, no defence being made; to set aside that verdict a rule nisi was obtained, on the ground that *ten^b days notice should have been given*, the defendant residing in *India*: and the court made the rule absolute, *Douglas v. Ray*, 4 *Term Rep.* 552. the point being determined in the C. P. in *Brind v. Torris*, 2 *Black. Rep.* 1205. which was an arrest in *London*, *venue* laid *there*, after arrest and before declaration, he went to *Scotland*, attorney accepted the declaration in *London*, and pleaded, the court held *fourteen days notice of trial necessary*.

Notices of trial, or of executing inquiry, and countermands ought to be in writing. *N. on R. M.* 4 *Ann.*

Sunday.

Sunday is accounted a day in these notices, so it be not the day on which the notice is given. *Mod. Caf. L. and Eq.* 21.

Explanation for assizes,

If notice of trial be given on the 22d of *February*, and there be only 28 days in that month, for the next

^a If *venue* had been in the *country*.

^b I take it the act of parliament is out of the case, it should have been according to the course of the court, 14 days.

affizes, and the commission day is the 4th of March, it is good notice, for one day is to be included, and the other excluded.

Notice of trial delivered to the turnkey against a Prisoner. prisoner is good. *Whitehead v. Barber*, Str. 248.

Likewise if the trial is to be in London or Middlesex, In London, the sittings after Hilary term, which ends the 12th of February, such sitting is the 14th for London (if not Sunday), the 6th is good notice, and 5th for Middlesex, being the 13th.

When a Term's Notice requisite.

By a note on R. M. 4 Ann. it is said, eight days exclusive is sufficient notice of trial, or of executing inquiry in all cases, except causes in London and Middlesex, where the defendant lives above 40 computed miles from London, then 14 days notice must be given; and likewise, except causes wherein no proceedings have been had within four terms after issue joined, then a term's notice must be given, and so likewise by proviso (unless the cause has been stayed by injunction or privilege).

If notice be given within the year, from the day of the last proceeding, having no regard to the terms, it is sufficient.

The court held, that the giving notice of trial at the end of half a year after issue joined, would prevent the necessity of giving a term's notice, till a year after the last notice, which was given and countermanded. Str. 531. *Green v. Gauntlet*.

It was settled that when a term's notice of trial is required upon an old issue, the notice must be given before the assign day, and that is a full term. *Bogg v. Rose*, Str. 1164.

Where a term's notice of trial is required, there must at the same distance of time, be the like notice of executing a writ of inquiry. *Peyton v. Burdus*, 2 Str. 1100.

The rule requiring a term's notice, does not extend to judgment as in case of a nonsuit. *Doe ex dem. Philips et al. v. Moses*, 5 Term Rep. 634. So in C. P. 2 Black. Rep. 1223. *Manby v. Worthy*.

A judge's summons, if no order made, is no proceeding; but a notice of trial, though countermanded, is, and so if an order be obtained.

Z

The

Construction
of rule requiring
a term's notice.

The construction of this rule formerly was held, that a *notice* of the intention to proceed was given before *the essoign* of the 5th or other subsequent term by giving a notice of trial; but the practice now is, to give a *whole term's* notice of trial without the former note, before the *essoign* day.

How time is
calculated.

Plea was delivered in *Hilary term* 1783, and no proceedings had till the 10th *March* 1784, when issue delivered, and ten days notice of trial given for the next assizes to be held at *Lancaster*; it was said by the master, that there ought to be a *whole term's* notice.

Signing a concilium is a step
to prevent a
term's notice.

If the plaintiff takes no step in the cause for three terms, and in the 4th a *concilium* is signed, and he obtains judgment in the 5th term; the signing a *concilium*, is taking such a step as to make it unnecessary to give a *term's* notice. *Bland v. Darley*, 3 *Term Rep.* 530. This rule only extends to voluntary delays made by the plaintiff, and does not apply where the proceedings have been delayed at defendant's request. *Ibid.* Vide my *C. P. Practice*. 2 *Burr.* 660. 2 *Black.* 762. 784.

If delayed by Injunction.

If defendant
suspend a cause
by injunction,
plaintiff may
proceed without
a term's notice.

Debt on *replevin-bond*, verdict for plaintiff; rule why verdict should not be set aside, cause having been suspended, after issue joined for above a year, and then brought to trial without a term's notice. Lord *Mansfield* expressed his indignation at the defendant's endeavouring to take advantage of a delay occasioned by himself, to protect himself against a deed under his own hand and seal; it was insisted that the trial *without a term's* notice was irregular, and that the court of exchequer before answer, would have given leave to have proceeded to trial, and that it was universally understood in practice, that an injunction is no excuse for not complying with the established rule. Mr. J. *Buller* said, that the practice was as had been stated: that it was grounded on the principle, that the injunction was no proceeding in the cause depending in this court; but that he thought this a case where the court might very well alter the practice. *Rule discharged.* *Hayley v. Ryley*, *Dougl.* 71. Vide 2 *Black.* 784. 919. held that a delay by injunction from the nature of the thing, is an exception to the rule.

If the plaintiff gives notice of trial and does not proceed, he cannot try it without new notice, unless by consent or rule of court. *R. M. 1654. S. 18.*

When new notice requisite.

Notice of trial, or of executing a writ of inquiry, given to a defendant, when his attorney is known, is not a good notice; but when his attorney is not known, then the notice may be given to the defendant. *Say. 133. Harding v. Stafford.*

Notice of trial or inquiry given to defendant, when good.

Doe v. Roe. Take notice of trial in this cause for the sittings after this present *Easter* term, to be held at the *Guildhall* of the city of *London*. Dated, &c. Yours, &c. *A. B.* plaintiff's attorney. *Mr. C. D.* defendant's attorney.

Notice of trial for London.

Doe v. Roe. Take notice of trial in this cause for the sittings after this present *Easter* term, to be held at *Westminster-Hall* in the county of *Middlesex*. If it be at the sittings within term, say, "*for the second sittings within this present Easter term, to be held at, &c.*"

For Middlesex.

If for the country, say, "*for the next assizes to be held at Oxford, in and for the county of Oxford.*"

Country.

Take notice of trial at the next assizes, without date, county, or name, is good, if indorsed on the back of the issue, but not on a separate paper. *Henbury v. Rose, 2 Str. 1237.*

It is the duty of an attorney to acquaint his client of the notice of trial, otherwise he may be answerable, in case a verdict goes against him *without defence*. *Vide Barn. 37.*

To acquaint client of notice of trial.

No notice of trial need be given, until the term succeeding that in which issue was joined. *Hall v. Buchanan, 2 Term Rep. 734.*

When notice to be given.

Upon the delivery of any paper book wherein an issue is joined, and notice of trial given on the back of the book; if the same be afterwards waived, and the general issue given, the notice which was given for the trial of the special issue, shall serve for notice of the general issue. *N. on Rule Hil. 8 Geo. 1.*

Notice of trial on special issue, to serve for the general issue.

Where the plaintiff upon any pleading of the defendant, tenders an issue, and the paper book is made up and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if the judgment be given for the plaintiff on the demurrer, the same notice which was given for the trial of the issue, shall serve for executing the writ

Where plaintiff concludes ad patriam, and gives notice of trial, defendant demurs to the replication in case judgment on demurrer.

Same notice to
serve for inquiry.

of inquiry. *N. on R. Hil. 8 Geo. 1.* but plaintiff ought to give notice of the *hour* and *place* of executing inquiry.

Trial by Proviso.

Trial by proviso is fallen into disuse, since the stat. 14 *Geo. 2. c. 17.* where the defendant may proceed to have judgment as in the case of a nonsuit (unless in some cases).

By stat. 7 and 8 *W. 3. c. 32.* if any defendant be minded to bring the issue to trial by *proviso* (when by course he may), he may, of the issuable term next preceding such intended trial to be had at the next assizes, sue a new *venire facias* to the sheriff in form aforesaid by proviso, and prosecute the same by writ of *habeas corpora*, or *distingas*, with a *nisi prius*, as though there had not been any *venire facias* sued out or returned in that cause, and so as often as the matter shall require.

Prohibition, &c.

That in *prohibition* it is said either party may carry down the record, so that it may happen two may be carried at one time. That in civil causes, the defendant cannot carry down a cause to trial by proviso, till after default in the plaintiff, except in some special cases, as in *quare impedit*, *replevin*, and *prohibition*, to have a writ to the bishop to return a consultation, *Clerk's Instructor*, 73.; and also that there is no trial by proviso in the king's case, without leave of the court. *Ibid.*

For what it was
ordained.

A trial by proviso was ordained by the statute, to the end that the defendant might free himself of suits brought against him, by trying the issue depending betwixt them, in case the plaintiff doth neglect to try as he ought, by the rules of the court.

None can be
had until default
made.

No trial can be had by proviso in *London* or *Middlesex*, until default made by the plaintiff *after the issue is entered on record*; nor in *country* causes, till the plaintiff hath made default in trying his issue the *next assizes after the issue is entered*; and in neither case, till a rule for trial by proviso be entered. *N. on Rule M. 4 An.*

When defendant
may make out
venire.

By the rules of the court, if the plaintiff will not try his issue after it is joined, in such time as he ought by the course of the court, in such case the defendant may make out the *venire* by proviso, which runs thus; after you come to the words *have put themselves on that jury*, say, " *Provided always, that if two writs thereof*
" *should*

" *should come to you, one of them only return and execute, and have there then this writ. Witness, &c.*"

The defendant in this case must give the plaintiff due notice of trial, *R. M.* 1651, because it lies in the election of the defendant, either to try the cause by proviso or not; and the plaintiff cannot presume he will try it, being defendant in the action, except the defendant give him notice that he will try it.

Defendant to give notice of trial.

When the defendant hath given the plaintiff notice of trying the cause by proviso, the plaintiff may also give him notice of trial, and both of them may return *venires*, &c. and make several records of *nisi prius*, and each may enter the cause for trial; but the trial shall be by the plaintiff's record if he enters it; and if he refuses, or withdraws it, then the defendant may proceed on his record.

Plaintiff may also give notice.

The master gives the rule to make up the record by proviso on the back of the issue. *Fiat nisi prius per proviso si querens fecerit defaultam. Let there be a record of nisi prius by proviso, if the plaintiff hath made default, which is entered at the clerk of the rules. Pay 1s. 10d. serve a copy. Str.* 1055. *Dodson v. Taylor.*

The rule.

If the defendant does not proceed after notice of trial, he is to pay costs to the plaintiff. *N. on Rule Mich. 4 Ann. Str.* 797.

Costs.

The defendant shall not try by proviso, till there be laches in the plaintiff; except in cases where the defendant is as plaintiff, as in *replevin*, *prohibition*, and *quare impedit*, which are to have a return, consultation, and writ to the bishop. 2 *Salk.* 652. *N. on R. M.* 4 *Ann.* (a). And in these cases, a trial by proviso must be resorted to, for the defendant cannot obtain judgment as in case of a nonsuit. *Jones v. Concannon*, 3 *Term Rep.* 661.

Replevin.

So if cause made a remanet at defendant's request, 3 *Term Rep.* 1. *Newburn v. Langley.* So if verdict be set aside, and a new trial granted. So if one defendant pleads, and the other lets judgment go by default. *Say. Rep.* 22. *Watson v. Jackson & al. Say. Costs*, 163.

If cause made remanet, &c.

Issue joined in *Hilary term* 1786, and plaintiff nonsuited, which was set aside, plaintiff did not proceed at the next assizes; on motion for judgment as in the case of a nonsuit, it was held, that the defendant might have carried down the record by proviso, for he had already complied with the statute in having carried the

If record has once been carried down it is sufficient, defendant must try it by proviso.

Rule by proviso, if obtained any time before trial, will do, though after notice of trial given.

record down to trial once. *Rule discharged. King v. Pippett, 1 Term Rep. 492.* The same defendant, on the 8th of *March* 1787, gave notice of trial (the commission day being the 19th), and on the 10th of *March* obtained and served the usual rule for a trial by proviso, and the plaintiff not appearing, was nonsuited: motion to set it aside. The court said, that, according to the old established practice, wherever the defendant carries down the record to trial by proviso, he must obtain a rule, that in case the plaintiff should make default, he might be at liberty to go to trial. But the only use of that rule is, that if two records are carried down to trial (the one by the plaintiff, and the other by the defendant), the former only should be tried. Then it is quite sufficient if the plaintiff has this writ at the trial. Besides, no inconvenience can result from this practice, because if the defendant does not carry down this record to trial after notice, he is liable to pay costs. *Rule refused.* In criminal cases no such rule is obtained at all. *Per Master Templer, ibid. 695.*

Issue out of chancery, court will suffer defendant to carry down the record.

Issue directed out of chancery, which defendant was desirous of trying, but which (it was suggested) plaintiff wished to delay; and on that ground, *motion that defendant might be at liberty to carry down the record to trial at the next assizes*: court thought the application reasonable, and granted the rule absolute in the *first* instance, saying that the plaintiff would not be damaged by it, for that if he chose to take down the record himself, the costs of this application must be paid by defendant. *Humphage v. Rowley, 4 Term Rep. 767.*

Error in fact.

On error in fact, defendant may carry the cause to trial without proviso. *Crompt. 219.*

How to put off Trial.

How to put off the trial.

For cause, the court may put off the trial on payment of costs; as if one of the defendant's witnesses be out of the way, and cannot be subpoena'd to come to the trial, he must apply to the court to put the same off: this application ought to be made *two days* before the day of trial, and is many times made without notice, as it is a rule to shew cause; but I should advise notice to be given, if made *so late as two days*, in which case the notice may contain, "*that the court will be moved*"

" on,

" *an, &c. that the trial may be put off until next Trinity term, on account of the absence of a material witness, on the behalf of the defendant, and in the mean time all proceedings be stayed;*" then prepare an affidavit, which ought to be made by the defendant (unless he is abroad), to this effect.

John Doe, Plaintiff,

and

In the King's Bench.

Richard Roe, Defendant.

R. R. of, &c. the defendant in this cause, maketh oath and faith, that issue was joined in this cause in Easter term last past, and that notice of trial was given for the last sittings within the said term; and this deponent further faith, that I. M. late of, &c. is a material witness for him this deponent, in the said cause, as he is advised and believes to be true, and that he cannot safely proceed to the trial thereof, without the testimony of him the said I. M. And this deponent further faith, that he hath endeavored to find the said I. M. out; that he hath been to the house of the said I. M. and was informed that he was gone to Exeter, in the county of Devon; and that he this deponent hath sent there, for the purpose of subpoenaing him; but that the said I. M. is gone from there, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said I. M. is, but is informed that he will be at home in one month. And that he this deponent hopes and expects to be able to procure the presence of the said I. M. within the first sittings of next Trinity term. Then state the service of notice in case it be so.

This is a rule to shew cause, pay 6s. fee to counsel 10s. 6d.; draw up and serve rule on the attorney of the other side, and make rule absolute if no cause shewn.

It is said, if motion is made to put off the trial at *nisi prius*, notice must be first given, and also copies of the affidavit to be produced. *Edwards v. Vesey, Rep. temp. Hard. 128.*

If the costs are not paid, the plaintiff may proceed to trial, and not have an attachment. *1 Salk. 83.*

If previous to the trial, libels have been dispersed by one of the parties to influence the jury and witnesses, it may be put off. *1 Burr. 510. Rex v. Gray.*

Copies of affidavits.

If costs are not paid.

Libels.

**Affidavit of
third person.**

An affidavit of a third person that *A.* is a material witness, in case defendant is abroad or out of the way, will do; formerly otherwise. *Fortesc. Rep.* 396. *Barn.* 437.

**If witness leaves
town.**

If a witness leaves town *after* notice of trial given, it is said, it cannot be put off.

If attorney ill.

If defendant's attorney is so ill as not to be able to attend the trial, court will put it off. *Hoyley v. Grant*, *Say.* 63.

**What the affida-
vit ought to
contain.**

It is laid down, that the affidavit to put off the trial for want of witnesses, must shew "*such witnesses to be absent and material, and that the defendant cannot go safely to trial without such evidence; that he has hopes and expectation of procuring the presence of such witnesses within a reasonable time (specifying it); that there has been no laches, or neglect, to procure their testimony.*" 3 *Burr.* 1514.

**A trial is not to
be hurried to do
injustice.**

A trial shall not be so hurried as to do injustice to the defendant; an affidavit in common form may be sufficient where no cause of suspicion appears; but men take such latitude to swear in the *common* form, that where a *suspicion arises* from the nature of the question, or from *contrary affidavits*, the court will examine into the *ground* upon which the delay is asked, and have refused to put off a trial, notwithstanding an affidavit in common form. *Ibid.* *Rex v. D'Eon.*

**What will satisfy
the court to put
off a trial.**

It is necessary, 1st, to satisfy the court that the persons are material witnesses; 2d, to shew that the party applying has been guilty of *no laches* nor neglect, in omitting to apply to them and endeavour to procure their attendance; and, 3d, to satisfy the court that there is a reasonable expectation of his being able to procure their attendance *at* the future time to which he prays the trial to be put off.

If in France.

And if he is out of the jurisdiction of the court, it ought to state, as in *France*, and the witness is willing to come. *Worsley Bart. v. Blissett*, *Hil.* 22 *Geo.* 3.

If the materialness of the witness did not appear sooner, the trial may be put off when cause called, but there should be notice.

If put off, the practice is only to put it off till the next term.

Short

Short Notice of Trial.

It is ordered, that where short notice of trial is to be accepted in country causes, such notice shall be given at least *four days* before the commission day, one day *exclusive*, and the other *inclusive*. *R. E. T. 30 Geo. 3.*

Short notice to be four days before commission day.

In town causes two days is sufficient, but it is usual to give as much more as the time will admit of.

In town, 2 days.

Countermand of Notice of Trial.

This also must be in writing, and if the action be laid in *London* or *Middlesex*, and defendant lives within 40 miles of *London*, *two days*, exclusive of the day in which the countermand is delivered, are sufficient; *Str. 849.* but if the *venue* be laid in the country, *six days* are to be given, at least, before the intended trial, pursuant to the statute *14 Geo. 2. c. 17*; or if the *venue* be laid in *London* or *Middlesex*, and the defendant lives above 40 miles from *London*, *six days*, at least, must also in that case be given. "*Doe v. Roe, I hereby countermand the notice of trial given you in this cause. Yours, &c.*"

Countermand of notice of trial.

Which is served on defendant's attorney.

Notice cannot be countermanded and continued at the same time. *Vide Barn. 301.*

If the plaintiff does not proceed to trial or countermand in time, the defendant shall have his costs. *R. M. 1654, f. 18.*

Costs.

The *two* or *six* days notice of countermand, are reckoned *one inclusive*, the other *exclusive*. Cannot be given on a *Sunday*, and in a country cause, may be given to the attorney, or the *agent* in town.

The days reckoned.

After countermand, new notice must be given. *R. M. 1654, f. 18.*

Continuance of Notice of Trial.

This is only given in *London* or *Middlesex*, which plaintiff may do; as for instance, if the plaintiff give notice of trial for the *first sitting* in term, he may, by giving notice, *continue* his notice of trial for the second or third sitting or sittings after term, but it can be continued only *once* in a term. *Str. 1119. Green v. Gifford.* *Two days* are sufficient; one day *inclusive*, the other *exclusive*: as for instance, *Monday* for *Wednesday*

Notice of continuance.

nesday is good. "I hereby continue the notice of trial given you in this cause to the sitting after this present *Easter* term." Dated, &c.

A good continuance of a *bad* notice of trial will not avail. *Sell.* 412.

In the C. P. a notice of trial given for the sitting after term, cannot be continued to the first sitting in the next term, but in *this court* the master thinks it may.

Costs for not proceeding to Trial.

Costs.

If the plaintiff does not proceed to trial, or countermand in time, defendant on affidavit of attendance, and necessary expences, shall have his costs taxed, *R. Mich.* 1654, *sec.* 18. But although the plaintiff does not proceed to trial, whereby costs are taxed for the defendant, and afterwards gives new notice of trial, yet the court will not stay the trial for not paying them (except in ejection), because defendant hath another remedy to recover them. *N. on R. M.* 4 *Ann.* (c). *Andrews*, 17.

Trial put off on payment of costs must be paid, or may proceed.

Trial put off upon payment of costs, the defendant did not pay, plaintiff proceeded to the trial, and the court was moved to set it aside on payment of costs, and the costs of the motion; but it was held that it was a *conditional rule*, and that the costs ought to have been paid, and refused to set aside the verdict.

Pauper.

A pauper shall not pay costs for not going to trial, *Str.* 983. 420.; but you may move to dispauper him. *Str.* 983.

Affidavit to move for costs for not going to trial.

If the plaintiff does not proceed to trial pursuant to his notice, you may move the court for the costs, upon an affidavit, stating, "That the action was commenced in *Easter* term, that in *Trinity* term *issue* was joined, and notice of trial given thereon for the sittings after the said term, and that the plaintiff did not proceed to the trial thereof, nor did he countermand such notice."

How to move.
No notice is requisite.

Give this affidavit to counsel, with half a guinea, who will move for a rule, which is referred to the master in the first instance; draw up same at the clerk of the rules, pay 5s. 6d. get appointment thereon, from the master to tax the costs; if not paid, a demand must be made by defendant's attorney on plaintiff; and

and if he neglects to pay, make affidavit of such demand and refusal, move for an attachment, which is absolute in the first instance.

N. B. The rule may be made to be paid to *defendant*, or his *attorney*.

J. W. of, &c. and *C. D.* of, &c. severally make oath and say, and first this deponent *J. W.* for himself saith, That he did personally serve the abovenamed plaintiff with a true copy of the rule, and the master's *allocatur* thereon, hereto annexed, and at the same time shewed him the said original rule and master's *allocatur* thereon, and that he this deponent then demanded of him the costs allowed by the master on the said rule, but that the said plaintiff did not then, nor at any time since, pay the same to this deponent, and the same now remains unpaid to this deponent. And this deponent *C. D.* for himself saith, That he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

Affidavit of demand and refusal, if payable to the attorney only.

The affidavit must state *personal* service and *original* shewn, the *day* of service, and *demand* precisely; on or about such a day not sufficient.

This is a rule absolute in the first instance on the master's *allocatur* for costs merely, draw up the rule, and then take same to your clerk in court, at the crown office, who will make out attachment, pay 17s. get warrant thereon, and give it to your officer. His fee is one guinea.

Rule absolute in first instance.

Of Judgment as in Case of a *Nonsuit*.

Trials by proviso, on account of the expence, are much refused; a more eligible remedy being given to the defendant, in case the plaintiff delays proceeding to trial in due time, by stat. 14 *Geo. 3. c. 17.* which enacts, That where any issue shall be joined in any action or suit at law, and the plaintiff or plaintiffs in any such action or suit have or hath neglected to bring such issue on to trial; *according to the course and practice of the court*; the judges at any time after neglect, upon motion made in open court, due notice having been given thereof, may give the like judgment for the defendant, as in cases of nonsuit, unless the judges shall, upon just and reasonable terms, allow any further time or times for the trial of such issue. And if the plaintiff

or

or plaintiffs shall neglect to try such issue within the time or times so allowed, then, and in every such case, the judges shall proceed to give such judgment as aforesaid; and this judgment is to have the same force as judgments of nonsuit, and the defendant to be allowed costs in any action or suit, where they would upon nonsuit be entitled to same, and in no other action.

Qui tam actions. This statute extends to *qui tam actions*, 1 *Wils.* 325. as well as others, to the traverse of the return to a *mandamus*. 4 *Term Rep.* 649.

Issue to be entered. Before judgment as in the case of a nonsuit can be moved for, the issue must be entered on record.

In a town cause. If an issue in a town cause be joined in *Trinity* term, and delivered *with notice of trial* for the sittings after *that term*, and the plaintiff does not proceed to trial, the defendant may move for judgment in *Michaelmas* term as in case of a nonsuit.

If an issue is delivered in *Trinity* term as of that term in a town cause, and *no notice of trial is given*, yet if the plaintiff was in time to have given notice for the sittings in or after term, and did not proceed to the trial thereof, this motion, it is said, cannot be made until *Hilary* term, because he has not said (by giving notice of trial) that he is ready to proceed.

If the plaintiff delivers his issue so late in *Trinity* term, as not to be able to give notice of trial for the sitting after that term, then the defendant cannot move until the *Hilary* term following, *Michaelmas* term being the term in which he makes default.

Although the issue be joined early in term so as to give notice, yet not bound so to do till next term.

The issue was joined 11th *November*, early enough to have given notice of trial for the sittings after *Michaelmas* term, the *venue* being in *London*; but as plaintiff *did not* give such notice then; *motion for judgment as in the case of a nonsuit*, 6th *Feb.* The court held, that as the plaintiff had not given his notice in *Michaelmas* term, he was not entitled to the judgment, and discharged the rule. *Munt and another v. Tremamondo*, 4 *Term Rep.* 557. *contra* 1 *H. Bl. Rep.* 65. *Frampton v. Payne*.

Country cause.

If an issue be joined in *Trinity* term, and delivered in a country cause with notice of trial for the then next assizes, if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in *Michaelmas* term (although he compel the plaintiff

plaintiff by rule to enter his issue in that same *Michaelmas* term).

If an issue be delivered so late in a country cause, The like. that the plaintiff could not give notice of trial as of *Trinity* term, then the defendant cannot move for judgment as in the case of nonsuit until *Easter* term following (his default not happening till *Lent* assizes).

It was ruled, that the rule requiring a term's notice of intention to proceed, does not extend to a motion for judgment as in case of a nonsuit. *Doe ex dem. Philips v. Moses*, 5 *Term Rep.* 634. So determined in *C. P. Manby v. Worthey*, 2 *Bl. Rep.* 1223. Term's notice does not extend to judgment as in case of a nonsuit.

How to proceed.

In order to proceed regularly (the issue being entered on record), move the court on the following affidavit; notice of this motion *need not be given*. *Loft.* 265.

J. W. of, &c. attorney for the defendant in this Affidavit. cause, maketh oath, and saith, That *issue* was joined in this cause, in *Hilary* term last past, and notice of trial was given for the sittings after the said term; and that the said plaintiff did not proceed to the trial thereof pursuant to the said notice.

Sworn, &c.

J. W.

Give it to counsel with 10s. 6d. and remember to have the roll in court; or, if you are at *Westminster* before the sitting of the court, Mr. *Austin's* deputy will mark it in the treasury, "*read*," pay 1s. 6d. in the evening draw up the rule, pay 6s. serve copy on plaintiff's attorney, make affidavit of the service; give it to counsel with one guinea, to make it absolute, which cannot be moved by him till *the day after* the day for shewing cause.

On the part of the plaintiff, if only one notice has been given, it is necessary for him to shew Plaintiff must shew some excuse. some reasonable excuse why he did not proceed to trial; for undertaking peremptorily to try, at the next sittings, or next assizes, will not do; there must be *some excuse* in this court, though a *slight* one will do, with a peremptory undertaking; but the practice in the C. P. is contrary; if after *two* notices, the court will expect a *real excuse*, as they will after the *first notice* in penal actions, not choosing such kind of actions should hang over the head of the defendant; and in other actions shew as a reason *the absence of a material*

material witness, naming him, and all endeavours used to subpœna him, and when expected home; or any other real cause. If put off, it is only from term to term.

Insolvency of defendant.

Insolvency of the defendant, since the action brought, is a good excuse for not proceeding to trial, for it would be extremely hard, if a party should be obliged to proceed, and put himself to expence, without a possibility of recovering either debt or costs. *Bayley v. Wilkinson*, Doug. Rep. 670.

Cesset processus.

But it is said, unless the plaintiff will consent to stay all further proceedings, and to enter a *cesset processus*, the court will bind him down to a peremptory undertaking. *Tidd*, 499. In the above case the rule was discharged.

Rule discharged on affidavit which is false, court will not open the matter again.

If a rule to shew cause why there should not be judgment as in the case of a nonsuit be discharged, on an affidavit which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the former one; but if the matter was thought of previous, the court will suspend their judgment on it till the matter is examined. *Davis v. Cottle*, 3 Term Rep. 406.

When not entitled to Judgment.

When not entitled to this judgment.

Action against two on a joint promise; judgment against *Walker* by default; issue joined by *Goyton*, and the plaintiff neglected to bring it on to trial, and the common rule for judgment as in the case of a nonsuit obtained. Court held, that as the plaintiff was not liable to be nonsuited at the trial, the defendant therefore was not entitled to this judgment. *Weller v. Goyton and Walker*, 1 Burr. 359. 1 Ld. Raym. 716. 12 Mod. 651.

If once the cause has been carried down, defendant must afterwards take it down by proviso.

Held that plaintiff having once carried down the record to trial, and nonsuited, which was set aside, he had complied with the statute; therefore defendant in this case must carry it down by proviso. *King v. Pippett*, 1 Term Rep. 492.

If issue was joined early enough for the next assizes, yet plaintiff not bound to give notice.

Issue was joined in a country cause early enough in last Trinity term to have given notice of trial for the summer assizes; and because no such notice was given, motion in Michaelmas term for judgment as in the case of a nonsuit. Court; The plaintiff is not bound to give notice of trial till the term succeeding that in which issue was

was joined, and that in this case, plaintiff had given notice of trial in this term. *Hall v. Buchanan*, 2 Term Rep. 734.

If the cause has been carried down, and although made a remanet on certain conditions not complied with, yet judgment as in the case of a nonsuit shall not be given, for the statute is complied with by carrying it down once. *Mewburn v. Langley*, 3 Term Rep. 1.

If cause carried down, and made a remanet, no judgment.

Per Cur. In replevin both parties are actors, and as the defendant might have carried down the record by proviso, it is an answer to the application of judgment as in the case of a nonsuit. *Jones v. Concannon*, 3 Term Rep. 661. *C. P. contra. Barn.* 317. But *C. P.* have now complied with the *K. B. M.* 33 Geo. 3. and refused the rule. This question was again agitated in this court, and a rule was refused. *Shortridge v. Hiern*, 5 Term Rep. 400. *M.* 34 Geo. 3. court saying, the common pleas did not differ from this.

Replevin.

If Rule absolute.

If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 5s. then get a double half-crown stamp put upon the rule, bespeak the roll of Mr. *Edge*, so as the master may mark the costs; pay in term time 1s. 6d. in vacation 5s. 10d. more for the keys of the treasury, chief clerk's fee 4s. 6d.

If rule absolute, how to proceed.

If Cause put off on Undertaking.

If the cause is put off on a peremptory undertaking, the plaintiff must draw up the rule, pay 7s. and serve it on the defendant: and if he does not proceed to the trial, then apply for an office copy of the rule; pay 3s. 6d. and move the court for judgment on the following affidavit; see to counsel half a guinea.

If cause put off on a peremptory undertaking, and no proceeding to trial.

J. K. of, &c. attorney for the defendant in this cause, maketh oath and saith, that this honourable court was moved in last *Hilary* term for judgment as in the case of a nonsuit, and upon shewing cause, the plaintiff peremptorily undertook to bring on the said issue to be tried at the first sittings within this present *Easter* term; whereupon the annexed rule was made: And this deponent further saith, That the plaintiff did set down the said cause (*as the case is*) for trial in pursuance of the said rule, but withdrew his record, and did not proceed to the trial thereof.

Affidavit.

Trial

Trial at Bar.

29 Ed. 1. c. 30.
 35 H. 8. c. 6.
 4 & 5 P. & M.
 c. 7. 5 Eliz.
 c. 9. 7 & 8 W. 3
 c. 32. 1. 3.

After *issue* joined, and not before, *Str.* 696. you may move to have a trial at bar, which must be by special jury, *R. Trin.* 8 *W.* 3. if attorney of one side shall make default to appear to strike out twelve, the secondary shall name the jury in his absence and strike out twelve, and the rest to be returned, the party applying to be at the expence, *stat.* 3 *Geo.* 2. c. 25. (but this cannot be had in *London*, the citizens not being to be brought out of the city), *Str.* 854. Vide 2 *Wilson*, 136, *contra.* They are granted either upon the value of the lands, or difficulty of the title, for which reason the court will not grant them till *issue* joined, 12 *Mod.* 331.; nor can they be granted, though the parties consent, without leave of the court. *Str.* 696. But in ejectment, a trial at bar may be ordered before *issue* joined, *Say. Rep.* 155.; but not before plea, *Lill. Prac. Reg.* 741.

It ought to be moved for in the term preceding that in which it is intended to be tried; as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* term, except where the lands lie in *Middlesex*. And *Buller J.* said, it is never allowed in an issuable term, *Coleman v. The City of London*, *M.* 21 *Geo.* 3. unless the crown be concerned in interest, *N. on R. M.* 4 *Ann.* (c), or under very particular and pressing circumstances. 1 *Str.* 52. 2 *Lill. P. R.* 615. and 271. 237. 1 *Burr.* 273.

Notice of the
 trial.

It is said antiently, there was no other notice given of such trial, than the rule in the office, but afterwards 15 days notice, *Salk.* 649. Now, notice of trial must be given as in other causes; and when the rule is obtained, the day appointed ought to be entered into the clerk of the papers book in the office; and before it be so entered, notice of trial ought not to be given. *Lill. Prac. Reg.* 741. *Sty.* 509. and the notice should be, "To be tried at the bar of the court, on, &c. at Westminster-Hall;" a copy of the rule may be served at same time.

^a Trials by the country are at bar, or *nisi prius*;—before Statute of Westminster, civil causes were tried at the bar of the court, or when of no moment, before the justices in eyre, 3 *Black. Com.* 352.

A week

A *week* previous to the trial, copy of the issue is to be left with the clerk of the papers, who makes four copies for the judges, and *delivers* them, the plaintiff's attorney pays the clerk of the paper's fees; the record is to be left with the chief justice as in other cases.

Copy of issue to be left with clerk of papers.

The most proper case for a trial at bar is, where it appears that a question of law, of some nicety, will arise, and that this will be so complicated with a question of fact, that the whole matter must be determined by the jury, under the direction of the court. *Trin. 4 Geo. 3. Whitaker v. Burrow, C. B.*

What a proper case.

Partridge shewed cause against a trial at bar, that lessor of plaintiff was in such indigent circumstances as not to be able to bear the expence, and that one of his witnesses was a woman of eighty, who might die before the trial. The value of the premises 2000l. a year, and the question whether a codicil, by which they were devised, was duly executed. 2 *Salk.* 648. cited. Court were of opinion, that this was a case fit for a trial at bar; but said, as it was a favor asked by the defendant, they would lay him under terms, that if he succeeded, he should only have *nisi prius* costs; but if lessor were to succeed, he should have bar costs; and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. That the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk* where the premises were situated, which was consented to. *Holmes v. Brown, Dougl.* 348.

Grounds for granting a trial at bar, are value, length, and difficulties, and court may lay the party applying under *nisi prius* costs, and paying bar costs, and tried in *Middlesex* by consent.

Upon application for a trial at bar, the court will in every case exercise its own discretion, upon the peculiar circumstances thereof. *The King v. Amery, 1 Term Rep.* 363.

Court will exercise their own discretion.

It was moved that the lessor having privilege, might name a good plaintiff to be liable to costs; refused. *Preston v. Linger, Str.* 479.

Lessor privileged.

If a justice of the one bench or the other be concerned, the trial shall be at bar upon motion without affidavit. 1 *Sid.* 407. *Morton v. Hopkins.*

If one of the justices, &c.

The affidavit on which the application is made must state, the value and difficulty, as in ejectionment, that the title will depend on the deduction of a long and intricate course of successions and descents, and the effects and operation of several deeds; and that a variety of points of law

Affidavit.

and other questions will arise, which he conceives, and is advised, will be necessary that the cause should be tried at the bar of the court. It will be a rule to shew cause.

Venire.

The special jury is obtained as in other cases, and a special *venire* and *distingas* issued; without the clause of *nisi prius* being added.

May countermand.

The plaintiff may countermand notice of trial, though it be a trial at bar (which is always appointed by the court), and prevent the cause being tried at the day, nor can it be brought to trial, unless some day be appointed again by the court. *N. on R. M. 4 Ann. (c).*

Of venire or distingas, and jury.

A trial at bar is had upon the *venire* or *distingas*, as at common law, without any clause of *nisi prius*; and by a special jury of the county where the action is laid. *1 Burr. 292.* Six days notice at least ought to be given to the jurors before trial. *Say. Rep. 30.* And in *Denn v. Lord Cadogan*, where nine of the jurors only appeared, the counsel for the plaintiff prayed a *decem tales*, as this trial could not, by the course of the court, have come on again till *Michaelmas* term (this being *Easter*), there being gentlemen sufficient in town to make a complete jury, the court ordered, the return of the *decem tales* to be on the *Monday* following (though there had been no instance before of it). But had there not been sufficient, the trial must have been adjourned, and a *decem* or *octo tales* awarded, as at common law. *5 Term Rep. 457.* For the parties in this case cannot pray a *tales* upon the statutes; and no writ of *alias* or *pluries distingas*, with a *tales* for the trial of issues at bar, shall be sued out, before the precedent writ of *distingas*, with the panel of the names of the jury annexed, shall be delivered to the secondary of the court, to the intent that the issues forfeited by the jury for not appearing upon the precedent writ, may be duly estreated. *2 Lill. P. R. 123.*

New trial.

After a trial at bar, a new trial may be moved for, as in other cases. *1 Burr. 395. Bright v. Eynon.*

If action in a county palatine.

Where the cause of action arises in a county palatine, it has been doubted whether this court can compel the inhabitants of the palatinate to attend as jurors on a trial at bar. *Say. Rep. 47. 1 Term Rep. 363. Rex v. Amery.*

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Special Jury.

GIVE brief to counsel, with the name of the cause, and indorse thereon, "*To move for a special jury;*" (fee 10s. 6d.) he will sign it; take it to the clerk of the rules, who will draw up rule, (pay him 6s.); get an appointment thereon from the master to nominate the forty-eight, serve copy on the attorney of the other side, and the sheriff also must be served; attend master, and he will nominate the forty-eight, (pay master 2l. 2s. sheriff 2l. 2s.); when this is done, master's clerk makes out copies for each party, (pay him 5s.). When you are ready to strike, then apply to the master for another appointment; serve copy of rule, and that appointment on the attorney; attend the master again, and he will strike out twelve on each side, beginning with the plaintiff first; the clerk then makes copies, which reduces them to twenty-four, to try the issue, and a special writ of *distringas juratorum* issues for that purpose. Though the jury be at the instance of the defendant, yet the plaintiff is bound to sue out the *distringas*, and summon the jury.

Discretionary in master whether he will strike *ex parte*, till the third appointment.

"The person or party, who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury; and shall not have any farther or other allowance for the same upon taxation of costs, than such person, or the party, would be entitled unto, in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." *Stat. 24 Geo. 2. c. 18.*

No costs of a special jury shall be allowed, unless the judge certify in court.

None to take more than one guinea, except where there is a view.
No person who shall serve upon a special jury, or be returned, shall be allowed to take for such serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding 1l. 1s. (except in causes wherein a view hath been directed).

Same Stat.

Jury was nominated in *Michaelmas* term, but the twenty-four had not been struck out by the parties. In

The change of sheriff's makes no difference if the jury be once nominated.

Hilary term appointments were made out, and defendant's attorney (though he attended) refused to strike, because the jury were nominated in *Michaelmas* term. Lord *Mansfield* was clear the master ought to do it, without any direction from the court; and said, it was right for him to act as usual, unless there should appear any particular reason to the contrary: In the present case, there had been no change of sheriffs, which Lord *Mansfield* observed had been given as a reason why the same jury should not serve for the trial of the cause, which had been already struck for a former intended trial. But he said he did not see the reason why the change of the sheriffs should make any difference. Mr. *Wallace* said, the court of C. P. had lately determined it should be so, and that the change of sheriffs makes no difference. Lord *Mansfield* said he was glad of it. *Cowp. Rep.* 412. *Rex v. Hart. N. B.* This is now the established practice.

If after special jury struck, cause goes off for want of jurors, the first jury must try.

In *Trinity* term a special jury was struck, but for default of jurors at the sittings after said term, the information was not tried.—A rule was obtained for striking a new jury, which *Erskine* moved to discharge, on the ground that, after a special jury had been once struck, the jury alone, or as many of them as appeared when the cause came on to be tried, with the addition of talesmen only, could try the cause, and the court made the rule absolute. *Rex v. Perry, 5 Term Rep.* 455.

View.

FORMERLY there could not have been a view in personal actions, but upon withdrawing of a juror after they were sworn, and consent of the parties by a rule of court. Now in actions of waste, trespass *quasi clausum fregit*, and other actions, where it appears to the court to be proper and necessary that the jurors, whether common or special, who are to try the issues, should, for the better understanding of the evidence, have the messuages, lands, or place in question viewed, the court is authorized by *stat. 4 & 5 Ann. c. 16. s. 3.* to order special writs of *distringas*, or *habeas corpora*, to the sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question, some

View may be granted in any action where necessary.

some convenient time before the trial; who then and there shall have the matters in question shewn to them by two persons named in the writs, to be appointed by the court; and the said sheriff executing the writs is especially to return the *view* made accordingly.

By *stat. 3 Geo. 2. c. 25.* (the balloting act) *s. 14.* Six of the jurors, or more, shall have the view.
 it is provided, "*That where a view shall be allowed, six of the jurors named in the panel, or more, shall have the view, and shall be the first sworn (or such of them as appear) before any drawing, and so many only shall be drawn to be added to the viewers who shall appear, as shall, after all defaulters and challengers allowed, make up the number of twelve, to be sworn for the trial of such cause.*" But as the having a view was

not by either of the statutes made a matter of course, though such a practice had prevailed, and had been abused for the purposes of delay, the court thought it their duty to take care that their ordering a view should not obstruct justice, and prevent the cause from being tried; and they resolved not to order one any more, without a full examination into the propriety and necessity of it: for they were all clearly of opinion, that the act meant that a view should not be granted, unless the court was satisfied, that it was *proper and necessary*; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view, than be delayed for a greater length of time: Accordingly they added a clause to the usual rule for views, purporting that the party praying a view consented, "*That in case no view should be had, or if a view should be had by any of the jurors whomsoever (though not six of the first twelve), yet the trial should proceed, and no objection be made on account thereof, or for want of a proper return.*" Since which, motions for views are become motions of course without affidavit, with such additional consent annexed to them. *Vide 1 Burr. Rep. 256, 257.*

In actions of *waste, trespass quare clausum fregit*, and *nusance*, the motion is of course, the necessity appearing on the pleadings. When of course.

In term time give brief to counsel "*to move for a view,*" see 10s. 6d.; take the brief to the clerk of the rules, who will draw up same, 10s.; but first apply to the opposite attorney for the *name* of his shewer, and *place of abode*, and have yours ready, so that

How to obtain rule.

the rule may be properly filled up; and also *the day and place where the jurors are to meet* must be inserted.

When you have drawn up the rule, serve copy on the opposite attorney, leave the original, with the names of the jurors (if special), with the sheriff; if common, he has them, and he will summon the jury; pay him 2l. 2s.; his fee for attendance 1l. 1s.; and no evidence is to be given on the view, but the premises only are to be shewn. In town it is not usual to treat the jury, as heretofore, with dinners, but in the country it is, and at the expence of both parties. *N. B.* In vacation, by consent, you may have a judge's order for a view, upon producing counsel's hand, fee 10s. 6d. The expences are equally borne by both parties, which is particularly stated in the rule.

Shewers may
shew marks, &c.

The shewers may shew marks, boundaries, &c. to enlighten the viewers, and may say to them, these are the places which on the trial we shall adapt our evidence.

Record of Nisi Prius by Bill.

THIS contains the whole pleadings, viz. a copy of the issue or paper book, and is to be ingrossed fairly on a double half-crown stamp parchment, and made up by the attornies themselves. In every record to be made up, there must be two *placitas*, the one preceding the *issue*, which is to be *of that term in which the issue is joined*, the other, *the term the cause is to be tried*. But if the cause is to be tried the *same term the issue is joined*, then the two *placitas* are to be of *that term*.

So if there is a
demurrer.

If there be a *demurrer* to any of the pleadings, and the cause is to be tried before or after that be disposed of, all the proceedings must be entered on the *nisi prius* record, the same as made up in the paper book.

But if respondeas
ouster be awarded
on a plea in
abatement.

But where there has been a plea in abatement, and a judgment of *respondeas ouster* awarded, and the defendant pleads in chief, the issue is made up *without* taking notice of any of the pleadings in abatement. 7 *Mod.* 51. *Ld. Ray.* 329. *contra*, but 7 *Mod.* is a later case.

Where two
partners sever in
pleading.

Assumpsit against two, they sever in pleading. One pleading bankruptcy, on which issue was joined. The other pleaded a judgment recovered against him and the

the other defendant. There was a *nolle prosequi* entered, not to proceed further against the bankrupt, and plaintiff proceeded to final judgment against the other. On error being brought, the judgment was affirmed. *Noke & Chiswell v. Ingham*, 1 Wils. 89.

Where there are several defendants, and they sever in plea, whereupon issue is joined, the plaintiff may enter a *nolle prosequi* as to one defendant at any time before the record is sent down to be tried at *nisi prius*. 2 Roll. Abr. 100. Salk. 457. *Greeves v. Rolls*.

When a *nolle prosequi* may be entered against one,

The Record.

Pleas before our lord the king at Westminster, of the term of the holy Trinity in the 36th year of the reign of our sovereign lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1796.

Record where the issue and trial are of different terms.

Roll 520.

Mansfield and Way.

London, } Be it remembered, that on to wit, } (to the end of the *issue verbatim*); then enter a second *placita* as follows:

Pleas before our lord the king at Westminster, of the term of St. Michael, in the 36th year of the reign of our sovereign lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1796.

Second placita.

London, } The jury between John Jones, by his attorney, plaintiff, and Edward Powis, defendant, of a plea of trespass on the case^a, is respited before our lord the king at Westminster, until

Jurata for London.

^a Or debt, as the action is.

next after ^b, unless the right honourable Lloyd lord Kenyon, his majesty's chief justice, assigned to hold pleas before the king himself, shall first come on

^b The return of the distringas.

the day of ^c, at the Guildhall of the said city, according to the form of the statute in such

^c The day of trial.

case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors, to make the said jury between the parties aforesaid, of the plea aforesaid; accordingly, the same day is given to the parties aforesaid, at the same place.

If the cause is to be tried in *Middlesex*, say, "unless, If in *Middlesex*, " &c. shall first come on the day of " at Westminster-Hall, in the county of " *Middlesex*."

If at assizes.

If at the assizes, " *unless his majesty's justices assigned to take the assizes in and for the county of Oxford, shall first come on the day of July at Oxford, in the said county, according, &c.*" and at the end of the jurata add, " *And be it known, that the king's writ on record was delivered to the deputy sheriff of the said county, on the day of in this same term, before our lord the king at Westminster, to be executed according to law, at his peril.*"

The last day of term your last placita is of.

To be entered in town two days before sittings.

" *It is ordered, that unless the causes to be tried at London and Middlesex be entered with the chief justice of this court by the space of two days before the sittings upon which such causes are to be tried, the marshal may enter a ne recipiatur, at the request of the defendant or his attorney.*" R. H. 15 & 16 Car. 2.

Time for Entry of Cause.

Time for entering causes for London and Middlesex after term.

Ordered, that in future, all causes to be tried at the sittings after term, shall be entered, and the records delivered to the marshal, at the times following: The causes in *Middlesex*, the first day of the sitting after term in *Middlesex*; and the causes for *London*, two days before the adjournment day, in *London*. R. Hil. 34 Geo. 3. The rule M. 17 Geo. 2. is at an end so far as relates to the entry. They are to be entered by nine in the evening.

New rule setting down causes where there is a special jury.

It is ordered, that no cause for the future be tried by a special jury, unless the rule for such special jury be drawn up, and the cause marked as a special jury in the marshal's book of causes, before the adjournment day after each term. By the court. R. Trinity Term, 30 Geo. 3. 1790.

Every cause to be tried in the order they stand, unless, &c.

Ordered, that every cause to be tried at *nisi prius*, in *London* and *Middlesex*, shall be tried in the order in which it is entered (beginning with *remanets*), unless it shall be made out to the satisfaction of the judge of *nisi prius* in open court, that there is a reasonable cause to the contrary, who thereupon will make such order for the trial of the cause so to be put off, as to him shall seem just. R. Mich. 17 Geo. 2.

If the plaintiff be hindered of a trial by a ne recipiatur, may try the cause at the next sittings, on notice.

It is ordered, that if the defendant in any action in *London* or *Middlesex*, and to be tried at the sittings of the lord chief justice of this court, shall enter a *ne recipiatur*, and by reason thereof hinder the plaintiff that he

he cannot proceed at that sitting, that then it shall be lawful to the said plaintiff to proceed to trial in the said cause at the next sitting of the said *chief justice*, after the entering of the said *ne recipiatur*, upon notice given during the said first sittings. *R. Mich. 4 Ann.*

But if a cause is to be tried at the sittings after term, no *ne recipiatur* can be entered, until after proclamation made by order of the chief justice for bringing in the records; and then if the record be not brought in, the defendant's attorney may enter a *ne recipiatur*. *N. on the above rule.*

When may enter a *ne recipiatur*.

Likewise if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff is not ready to proceed, the cause may be tried the next sitting, upon the *like notice* as when a *ne recipiatur* is entered by the defendant; and in either case, if the cause be not tried at such next sitting, notice is to be given as at first, unless it be made a *remanet*, and then new notice of trial is never given; for the defendant is bound to attend till the cause be tried. *N. on R. M. 4 Ann.*

Remanet.

Remanet.

Whenever the cause is made a *remanet*, no new notice need be given; but defendant must attend till the cause be tried. *2 Lill. Pr. R. 745.*

Remanet.

If the cause is not tried the day of the sitting, it is then made a *remanet* by the marshal of course; he alters the *jurata*, pay him 5s. get the *distringas*, alter the return, to the day of the next sitting (if it be a proper return day), if not, the next day, reseal it, pay 1s. annex it to the record again, as there is no occasion for the sheriff to return a new panel, nor is there occasion for a new stamp.

Remanet how to be made.

Care ought to be taken respecting this, for the *jurata*, if not altered, is not amendable, and the trial will be *coram non judice*; but the court will order a *venire facias de novo*. *1 Wils. 144. Crowder v. Rooke.*

Jurata must be altered.

Ordered, that the writs of *distringas*, and the records in causes, which stand over from one sitting to another, be regularly *resealed*, previous to the sitting to which they stand over; or in default, the causes be not tried. *R. E. 33 Geo. 3.*

Remanets, write of distringas, and record to be resealed.

When the record is ingrossed, make an *incipitur* on a roll (which get of Messrs. *Provost and Webb*, or Mr. *Adams*),

How to enter the issue, and pass the record in town.

Adams), first entering thereon the term the issue is joined, warrants of attorney for plaintiff and defendant, and part of the memorandum of the issue; take the issue and record to the clerk of the judgments, who enters the issue, marks the roll, record, and issue paper, pay him 3s. 6d. for the first ten sheets, and 1s. for every six more; if the issue should be of an old term, and the entries have not been made before, first get number-roll of Mr. Edge of the term issue is joined, then make out a docket for the entry, and docket same; take record to Mr. Way's office, King's Bench Walks, under the K. B. office, who will pass same, pay 7s. 6d. for the first eight sheets, and 7s. for every other eight, and 6d. to the sealer.^a

For the Assizes.

How to proceed at the assizes.

If at the assizes, the issue is entered the same as before, and record is passed at the same office with the clerk of the circuit in which the cause is to be tried; get the venire returned in town with the under-sheriff, pay him 2s. 6d.; send the *distringas* and *venire* into the country annexed to the record, and the writ and record are to be entered together, and left with the judge's marshal, pay 14s. 8d.

Writ and record to be entered together.

Ordered, by all the judges of England, that in every cause to be tried before them in their respective circuits, the writ and record shall be entered together, and that no record shall be received without the writ. T. 10, 11 Geo. 2.

The time of sealing records.

Ordered, that no record of *nisi prius*, for the trial of an issue at the assizes, shall be sealed after the end of three weeks next after the end of the term. This practice is altered, for by obtaining a judge's order (for which you now pay for at the time of passing the record 2s. and which the officer will procure at his leisure), you may have your record sealed, at any time before the assizes.

Altered.

Entry of record at assizes.

It is ordered, that no writ and record of *nisi prius* shall be received at the assizes in any county in England, unless they shall be delivered to be entered with the marshal before the first sitting of the court after the com-

^a Mr. Provoost acts as deputy to Mr. Way. He also acts as deputy to most of the clerks of the *nisi prius* for the different circuits, as pointed by the *custos breviarum*.

mission day (except in the counties of *York* and *Norfolk*), and there the writs and records shall be delivered to, and entered with the marshal, *before the first sitting of the court*, on the *second day after the commission day*, otherwise they shall not be received, and every cause shall be tried in the order in which they shall be so entered, without any preference or delay; unless it shall be made out to the satisfaction of the judge, in open court, that it is impracticable, or convenient so to do; who thereupon may make such order for the trial of the cause so put off, as to him shall seem just. And that a list of the causes, when so entered, shall be made by the marshal, and forthwith fixed up in some public place in the *nisi prius* court, there to remain during the whole time of the assizes, *R. H. 14 Geo. 2.*

Ordered, by all the judges of England, that no writ or record of *nisi prius* shall be received at the assizes in and for the county of *Norfolk*, or city of *Norwich*, unless such writ and record be delivered to, and entered with the marshal, *before the first sitting of the court*, or the *day next after the commission day.* *R. H. 32 Geo. 3.*

In Norfolk and Norwich, to be entered before first sitting.

The variance between the issue delivered and record ought to be mentioned at the trial and *objected* to; if the record be wrong, the court will mend it by the issue roll *after verdict* and *defence made.* The issue was 200*l.* damages, record stated 300*l.*; and roll accorded with it. *Vide 2 Wils. 160.*

Variance between issue and record.

If one of the defendants die after issue joined, it should be suggested on the roll, and entered on the record; but if properly suggested on the roll, though not so accurately set forth on the record, it is enough. *1 Burr. 363. Far v. Denn. 8 & 9 W. 3. c. 11. f. 7.*

If one die, suggestion.

If the record of *nisi prius* agree with the declaration delivered, a variation from the issue delivered is not material. *Str. 1131. Shepley v. Marsh. 2 Wils. 160.* For defendant's attorney should have refused the issue, if not agreeable to the declaration.

Variation from issue.

For record of *nisi prius* by original, *vide title Proceedings by Original.*

Venire and Distringas.

When the record is ready, then sue out *venire* and *distringas* (both of which are sealed only), get the *distringas* returned at the sheriff's office, pay in *Middlesex* 14s. 8d. in *London*, if common, 4s. 4d. if special 8s. 8d. and annex it to the record with the panel.

Venire facias if proceedings by bill.

George the third, &c. to the sheriff, &c. greeting. We command you that you cause to come before us, at *Westminster*, on next after (here insert some return-day before the trial, if a country cause, the last day of the term), twelve free and lawful men of the body of your county, each of whom having 10l. a year at the least, of lands, tenements, or rents, by whom the truth of the matter may be the better known, and who are in no-wise a-kin either to *A. B.* the plaintiff, or to *C. D.* the defendant, to make a certain jury of the county between the parties aforesaid, in a plea of trespass on the case (or as the case may be); because as well the said *C. D.* as the said *A. B.* between whom the contention thereupon is, have put themselves upon that jury; and have there then the names of the jurors, and this writ. Witness, *Lloyd lord Kenyon*, at *Westminster* (the first day of the term in which the cause is to be tried), in the 36th year of our reign. *Mansfield and Way.*

If where judgment goes by default against one and an issue as to the other defendant.

In case one of the defendants suffers judgment to go by default, and the other pleads to issue, after the words, "to make a jury of the county between the parties aforesaid," add these, "as well to try the issue between the said *A. B.* and *C. D.* joined, of a plea of trespass on the case, as to inquire what damages the said *A.* hath sustained by reason of the not performing the said promises and undertakings by the said *R.* made, as for his costs and charges by him sustained in this behalf, whereof it is considered, that the said *A.* ought to recover his damages, because as well the said *R.* as the said *A.* between whom the contention thereupon is, have put themselves upon that jury; and have there then the names, &c."

When plea of one defendant enures to all, and when not.

In actions of *contract*, as *covenant*, *assumpsit*, &c. the plea of one defendant for the most part enures to all, for the contract being *intire*, the plaintiff must succeed

^a If by original, return to be on a general return day, wheresoever, &c. upon

upon it, against *all* or *none*; therefore if he fail on the plea, he cannot have judgment or damages against the others, who let judgment go by default. 1 *Lev.* 63. 3 *T. Rep.* 662. But in actions of *tort*, as *trespass*, &c. where the *wrong* is *joint* and *several*; the distinction is, that where the plea of one of the defendants is such, as shews the plaintiff could have no cause of action against *any of them*, there, if this plea be found against the plaintiff, it shall operate to the benefit of *all* the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default. 2 *Ld. Ray.* 1372. *Str.* 610; but where the plea merely operates in *discharge* of the *party pleading it*, there it shall *not* operate to the benefit of the *other* defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the *other defendants*. 2 *Str.* 1108. 1222.

If there are two sheriffs, and one is interested in the cause, or related to either of the parties, the *venire* should be awarded to the other only; or if both are interested, then to the coroner of the county, which *interest* should be suggested in the issue.

If sheriffs are parties, the coroner to return *venire*.

George the third, &c. To the sheriff of, &c. greeting: We command you that you distrain the several persons named in the panel annexed to this writ; the jury summoned in our court before us, between *A. B.* plaintiff, and *C. D.* defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any for them, intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that you have their bodies before us at *Westminster*, on next after (here insert the first return-day after the trial), or before our right trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice, assigned to hold pleas in our court before us, if he shall first come on (the day of trial); if in *London*, say, at the *Guildhall* of the city of *London* aforesaid; if in *Middlesex*, say, "at *Westminster-Hall* in the county of *Middlesex*;" if at the assizes, say, "before our justices assigned to hold the assizes in your county, if they shall first come on" (the day of trial) at (the place where held) in your county, according to the form of the statute in that case lately made and provided, to make a certain jury between the said parties, of a plea of

Common distringas.

Return of the
venire.

of trespass on the case (as the action is), and to hear thereof their judgment of many defaults, and that you have there the names of the jurors and this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the day of _____ in the 36th year of our reign.

Mansfield and Way.

Distringas for a
special jury.
3s. 6d. stamp.

George, &c to the sheriffs of *London*, greeting: We command you, that you distrain *John Ling*, of *Coleman street*, *Joseph Lancaster*, of *Queen-street*, and so on, till you come to the end of the master's list, then add (merchants), the jury summoned in our court before us (as in a common one); and if there is a view after the word (default) add this, "*And in the mean time, according to the form of the statute in such case made and provided, we command you, that you have six of the first 12 of the said jurors, or as many more of them as you shall think fit, to take a view of the place in question, on the _____ day of _____ and that the said jurors meet on the same day, at the house of _____ (as in the rule) in your city, and proceed from thence to view the said place in the presence of T. B. on the part of the plaintiff, and G. H. on the part of the defendant, appointed by our court before us, to shew the said place to such of the said jurors as shall come to view the same; and that you make appear to us at Westminster, on the said day, in what manner you shall have executed this our precept, and have there then this writ. Witnesses, &c.*"

View.

Subpœna ad testificandum.

Frequently witnesses will not attend voluntarily; therefore, for the administration of justice, it was thought necessary that there should be some compulsory process to bring them to give their testimony, which process is by writ of *subpœna ad testificandum*; the form whereof is as follows:

Subpœna to
testify.
3s. 6d. stamp.
Four witnesses
only in one
subpœna.
Ciw 846.

George the third, &c. To *John Doe*, *Richard Roe*, &c. (you may put four in a writ), greeting: We command you, that, all excuses being laid aside, you and every one of you be, in your proper persons, before our right trusty and well-beloved *Lloyd lord Kenyon*, our chief justice, assigned to hold pleas in our court before us, at the *Guildhall* of the city of *London*, or "*at Westminster-Hall in the county of Middlesex*" (if in *Middlesex*): (if at the assizes, say, "*before our justices,*" "*assigned*"

"assigned to hold the assizes in and for the county of)
 "on the day of at in the said county,"
 by of the clock in the forenoon of the same day,
 to testify all and singular what you, or either of you
 know, in a certain cause now depending undetermined
 in our court before us, between *A. B.* plaintiff, and
C. D. defendant, of a plea of trespass on the case (*as*
the action is) on the part of the plaintiff, and at that
 day to be tried by a jury of the county; and this you,
 nor any of you, are by no means to omit, under the
 penalty upon each of you of 100*l.* Witness, *Lloyd*
lord Kenyon, &c. *Mansfield and Way.*

Teste the subpoena the last day of term.

Middlesex subpoena, to testify between *A. B.* plain-
 tiff, and *C. D.* defendant, on the part of the plaintiff.
 To be signed by Messrs. *Provost and Webb*, pay 1*s.* 8*d.*
 and 7*d.* seal; serve each witness with a copy; pay 1*s.*
 in town; if in the country the party must have his ex-
 pences tendered him, and that reasonable. 2 *Str.*
 1150. *Chapman v. Poynton.*

Præcine for
subpœna.

If a cause appointed for one sitting is made a *rema-*
net, the subpoena must be *re-sealed*, and *re-served*.
Anon. Reported by the master 23*d* June 1792.
 otherwise the witness is not bound to attend.

It is now the practice to serve a copy of the subpoena
 instead of a ticket.

As a subpoena requires *personal* service, to bring the
 witness into contempt, such service must allow rea-
 sonable time to the person served, for his attendance;
vide 5 *Burr.* 2682.

Reasonable time.

If the witness does not attend, he is liable, 1. *either to*
an attachment; 2. *a special action on the case*, *Doug.* 561;
 3. *or the penalty of 10*l.* by stat. 5 Eliz. c. 9. s. 12.*; and
 also for the further recompence given by that statute, if
 it has been previously assessed, by the court out of which
 the process issued. *Ibid.* *Pearson v. Iles.* As to grant-
 ing attachment, 2 *Str.* 810. *Ld. Ray.* 1528. *Barnard.*
 45. To warrant an attachment, *personal service is re-*
quired, *Str.* 1054.; and I think the party applying must
 swear him to be a material witness; this is stated, in the
 declaration in *Pearson v. Iles*, *Dougl.* 557. The cause
 of absence may be shewn, for it is supposed to be a
 wilful absence. The punishment will be remitted, if
 the witness make satisfaction. *Doug.* 560.

If any person has in his possession any writings, deeds,
 books of account, or other things, which may be ne-
 cessary

Subpœna duces
tecum, when
necessary.

cessary to produce at the trial, he should be served with a *subpœna duces tecum*; but if the plaintiff or defendant are to produce, or the attornies, then a notice to them will be sufficient. 3 Term Rep. 306.

Subpœna duces
tecum. 3. 6d.
stamp.

"George, &c." as in the former one, as far as the place of trial, then say, And that you bring with you and produce at the time and place aforesaid a deed of assignment, bearing date (describe the thing to be produced), and then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court before us, depending between, &c. (as in the former one); it is signed with Messrs. *Provost and Webb*, and sealed.

Of the Ha. Corp. ad testificandum.

Ha. cor. ad tes-
tificandum.

This writ is issued where a witness is confined in prison, directed to the marshal, sheriff, &c. in order to bring him before the court where the cause is to be tried, to give evidence on the part of the person who sues it out.

This writ cannot be obtained either by motion in court, or before a judge, without an *affidavit* made by the party applying, *that the witness is a material one.* Fort. 396.; and it must be signed by a judge, or of no effect. Cowp. 672. If it appear to be a contrivance to get the witness out, court will refuse it. 3 Burr. 1440. *Rex v. Burbage.*

Sailors.

If *sailors* on board a ship of war, are to be produced as witnesses, and have been served with a *subpœna*, and say they *will attend*, a *habeas corpus* may be applied for to the chief justice, on affidavit of that fact, and that *they are material witnesses*; but without which no *ha. corp.* can issue. *Rex v. Roddam*, Cowp. Rep. 672.

Prisoner at war.

Court thought there could be no *ha. corp.* to bring up a prisoner at war. Lord Mansfield said, the presence of witnesses who are prisoners of war, was generally obtained by an order from the Secretary of State: and an application was made for a *hab. corp.* to bring up such a prisoner, but without success. Afterwards a rule was granted to shew cause why defendant should not consent either to admit the fact of the capture, or that the prisoner should be examined upon interrogatories. If this consent be refused, the court said, they

would put off the trial from time to time, to give the defendant an opportunity of filing a bill in equity. The plaintiff agreed to produce all letters received concerning the matters in litigation. *Fury v. Newnham.* Dougl. Rep. 420.

That *J. B.* now a prisoner for debt, in custody of the marshal of this court, is, and will be a material witness for this deponent at the trial of this cause. And this deponent further saith, That he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said *J. B.* and that he is ready to attend the trial; vide *Crompt.* 248. as to this latter part, determined in *H. T.* 1780.

George the third, &c. To the marshal of our prison of the *Marshalsea*, greeting, (or to the person in whose custody he is): We command you, that you have the body of *John Wall*, in our prison, under your custody, as it is said, detained under safe and secure conduct, by whatsoever name the said *John Wall* may be called in the same, before our right trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice, assigned to hold pleas in our court before us at *Westminster-Hall*, in the county of *Middlesex*, "or at *Guildhall*, in the city of *London*," (if at the assizes) "before our justices assigned to hold the assizes in and for the county of *Oxford*," "on *Monday* the day of next, at *Oxford*, in the said county," by nine of the clock in the forenoon of the same day, there to testify the truth, according to his knowledge, in a certain cause now depending in our court before us, and then and there to be tried between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass and assault (as the action is); on the part of the said *C. D.* and immediately after, the said *John Wall* shall then and there have given his testimony before the said chief justice (if in town), if in the country, "before our said justices," to return him, the said *John Wall*, to our said prison, under safe and secure conduct; and have you there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, &c.

Mansfield and *Way*.

A *præcipe* is to be made (after allowed by the judge,) sign it with Messrs. *Provost* and *Webb*, pay 1s. 8d. seal 7d. then leave it with the marshal or theriff, in whose custody defendant is; he is to be paid fees, and will attend with the witness.

B b

Witnesses

Habeas corpus ad
testificandum.

Witnesses to
have a reason-
able time.

Witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be of as little prejudice to themselves as possible; and this court held that notice at two in the afternoon in the city, to attend the sittings that evening at *Westminster*, was too short a time. *Str. 510. Hammond v. Stewart.*

Personal service.

The court will not grant an attachment against a witness, if he *was not personally served*; without personal service, it is not sufficient to warrant a proceeding criminally against him, whatever it might do in an action. *Str. 1054. Smalt v. Whitmill.*

If the witness comes a distance off, there ought to be a tender of reasonable charges. *Ibid.*

Attorney.

An attorney for *defendant* if he be a subscribing witness, must give evidence if *subpœna'd*, or court will grant an attachment. *Doe v. Andrews, Cowp. 845.*

What not sufficient.

Two guineas from *Chester* to *London*, held insufficient. *Chapman v. Pointon, 2 Str. 1150.* When the *subpœna* is served, the expences must be tendered. And there must be enough tendered to cover the *whole* expences of the journey, and *return* back; and of the *necessary stay* at the *place of trial*.

Contingent
losses.

Any contingent losses which the witnesses may suffer by obeying the *subpœna*, cannot be allowed on the taxation of costs. *Thelluson v. Staples, Doug. 438.*

If not sufficient
tendered.

When less is offered, the witness is not obliged to trust to the courts allowing him more, when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get more again. *1 Black. Rep. 36. Bowles v. Johnson.*

The master will allow for foreign witnesses, the journey and voyage *going and coming*, and during their stay in England, *Doug. 438.*; but *not* the voluntary stay in England, *after the trial*.

Examining Witnesses on Interrogatories before a Judge.

If after issue is delivered, and notice of trial given a witness that is material on either side is so ill that he cannot attend, or is going abroad, or resides abroad, so that he cannot be had at the trial; the party who wishes for him may apply to the court for a rule, that

that he may be examined on *interrogatories de bene esse* before one of the justices of this court, or before commissioners appointed, but he cannot be examined *without consent*; and the court will stay the proceedings, as by putting off the trial. *Doug.* 419. if not consented to.—It is a rule to shew cause, and the motion is made upon affidavit “*of his being material on the part he is to be examined, without whose testimony you cannot proceed to the trial, and that he is going to Scotland, Ireland, or out of the kingdom, on such a day;*” counsel’s fee is 10s. 6d. for the rule to shew cause, and *one guinea* to make it absolute; rule 2s. *per sheet*; serve it on the attorney on the other side; make affidavit of the service, and if consented to, the rule will be made absolute. Notice must be given, and a copy of the interrogatories delivered to the opposite attorney of the time he is to be examined, so that the other party may be at liberty to file interrogatories, and cross-examine him on his part.

If it is in vacation, application must be made in a summary way; get a summons from a judge, to shew cause why *A. B.* a material witness, may not be examined, on the part of the plaintiff, on interrogatories, and upon producing the like affidavit as before, and consented to, the order will be granted.

In vacation a judge’s summons.

If a party refuse to consent to the examination of a witness to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party by putting off the trial; *Doug. Rep.* 420. *Furly v. Newnham*; and give an opportunity of filing a bill.^a

When court will assist.

If a witness not likely to be had at the trial be examined before a judge, and cross-examined by the other party, and his deposition put in writing, yet if at the trial it be proved, that the party might have him there, his depositions are not to be read. 12 *Mod.* 493. *Salk.* 691.

When depositions may be read.

If a party wants the testimony of witnesses whom he cannot compel to attend, the court may put off the trial from time to time, until the other party consents that depositions shall be taken where they are. *Moslyn v. Fabrigas, Cowp. Rep.* 174.

Court may put off the trial from time to time.

^a If the witness be abroad or in the country, the rule is the authority, no *dedimus* can issue to take the examination.

Where to take
witness.

The witness is to be taken to the judge's clerk, who examines him, and the interrogatories are to be left there, and he is to be sworn upon them; after he is examined on both sides, the judge's clerk will deliver out copies of the depositions. The interrogatories are to be signed by counsel, for which you pay him one guinea; ingross them on a 2s. 6d. stamp parchment.

The form of in-
terrogatories.

"Interrogatories to be administered to John Dean, a witness to be produced, sworn and examined, on the part and behalf of A. B. plaintiff, against C. D. defendant, before Sir Nath Grose, knight, one of the justices of the court of our lord the king, before the king himself, pursuant to a rule of the said court, made on next after in the 36th year of the reign of his majesty king George the third; or if it is an order say, (pursuant to an order of the said justice of our said lord the king, made the day of 1796)."

Imprimis,

Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them, and how long have you known them, either, and which of them? declare the truth, and your knowledge herein.

Secondly,

Look upon the deed or writing now produced and shewn to you at this the time of your examination, marked with the letter A. and purporting to be, &c. was such deed or writing sealed and delivered in your presence, and by whom? Were you a subscribing witness to the sealing and delivering thereof? And is your name indorsed and set as a witness thereto of your own hand-writing? And do you know the hand-writing of the other witness or witnesses thereto? And is or are the name or names of such witness or witnesses of the proper hand-writing of such witness or witnesses? And did you see them set any and which of their names, as subscribing witness or witnesses thereunto? Set forth the particulars at large, according to the best of your knowledge, remembrance, and belief, and the truth declare.

Last interroga-
tory.

Lastly, Do you know of any other matter or thing, or have you heard, or can you say any thing touching the matter in question in this cause, that may tend to the benefit and advantage of the complainant in this cause, besides what you have been interrogated unto?

Declare

Declare the same fully and at large, as if you had been particularly interrogated thereto.

J. D.

Interrogatories to be administered to *Richard Fenn*, a witness to be produced, sworn, and examined on the part and behalf of *C. D.* the defendant, at the suit of *A. B.* before, &c. Interrogatories for defendant.

It is said, if the witnesses reside in the country or abroad, a *dedimus potestatem* issues, which is annexed to the interrogatories, and the commissioners certify the answers under their seals. *Crompt. 229. Tidd 530.* I know of no such writ which issues out of the courts of common law; but if such a case happens, the clerk of the rules draws up a special rule, inserting therein the commissioners names appointed for this purpose, which is their authority; and they make their return as directed by such rule of court.

Counties Palatine.

In actions brought in counties palatine, no jury process is issued out of the courts above, a mittimus of the record to the justices there, commanding them to cause a jury to be summoned to try the issue between the parties, and return the same when tried to the courts at *Westminster*, being the *only writ sued out here* on this occasion, as follows; and the record is passed at Mr. *Way's* office, in the same manner as other records are: Mittimus only sent.

George the third, &c. To our justices of our county palatine of *Chester*, greeting: I he tenor of a certain record before us at *Westminster*, between *A. B.* plaintiff, and *C. D.* defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you (having inspected the same) by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the county to come before you at your next session, after this writ shall be delivered to you, each of whom having 10l. a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into; and who are in nowise related either to the said *A.* or to the aforesaid *C.* to recognize and make a jury of the county between the said parties, in the plea aforesaid, because Mittimus to a county palatine.

The venire and ha. corp. are made out by the prothonotry there.

This writ is
signed with
Messrs. Provost
and Webb, and
sealed.

Signing 1s. 8d.
Seal 7d.

as well the said *A.* as the said *C.* between whom the controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors, so to be impanelled between the said parties as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid between the said parties shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ, before us at *Westminster*, at a certain day which you shall appoint to the said parties, to be there to hear judgment thereupon. Witness *Lloyd* lord *Kenyon*, &c. *Mansfield* and *Way*.

Brief.

Brief.

The brief is instructions to counsel, for supporting the parties case in whose behalf it is made up and delivered, for calling witnesses to prove or disprove such matters as may benefit or prejudice the client, and for properly conducting the cause through the course of the trial; and to this end, it should contain *the names of the parties, an abstract of the pleadings, the case truly stated*, with such observations thereon as may be judged necessary and proper; and lastly, *the names of the witnesses*, with a short mention (as an index to the case, by way of proof) of what they respectively know in support thereof, that the counsel may not be at a loss to call the proper witnesses, for proof of particular facts, as may be necessary^a.

In this brief the names of the plaintiff and defendant are only once used, which is placed at the top of the sheet thus:

Between *John Denn*, plaintiff,
and
Richard Fenn, defendant.
In the King's Bench.
London, (ff.) The plaintiff declares, for that

^a Mr. *Sellon* says, the grand rule to be observed is *conciseness with perspicuity*. I perfectly agree with him, but it is too much to be lamented, that this rule is not attended to. I have seen *modern briefs* upon the common counts six sheets, which ought by no means to contain more than *two*, with the pleadings. I hope the courts will direct their officers to look into these *immoderate briefs*, and that they report to the court the *superfluous* sheets.

whereas

whereas the defendant, &c. here state the counts as short as you can to the end of the declaration: then the plea, replication, rejoinder, &c.; afterwards the case and evidence.

For the benefit of the clerk, I shall select a few of the general heads and leading maxims, relative to the law of evidence.

As in public judicatures it is necessary to search into the truth of facts as they really are, hence whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty the truth of any matter in dispute, whether such matter relates to a person's life, liberty, or property, is called evidence.

Upon an action of debt, when the defendant denies his bond, by the plea of *non est factum*, and the issue is, whether it be his deed or no, the plaintiff must prove the due execution of it, by the subscribing witness, or, if dead, the hand-writing of the obligor and witness, as also his death.

Evidence in the trial by jury is of two kinds, either written or parol, that is, by word of mouth. *Written proofs*, or evidence, are, 1. *Records*, and 2. *Ancient deeds of thirty years standing*, which prove themselves, (unless erased or interlined in material matter). *Bull.* 251. But 3. *Modern deeds*, and 4. *Other writings*, must be attested and verified by parol evidence of at least one of the subscribing witnesses. And the one general rule that runs through all the doctrine of trials is this, that *the best evidence the nature of the case will admit of, shall always be required, if possible to be had*; but if not possible, *then the best evidence that can be had shall be allowed.* *Carth.* 220. *Sho. Rep.* 39. For if it be found that there is any better evidence than is produced, the very not producing it, is a presumption that it would have detected some falsehood that at present is concealed. Thus in order to prove a lease for years, nothing shall be admitted, but the very deed itself, if in being; but if that be positively proved to be burnt or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced, or parol evidence given of its contents. *Mod.* 4. *Str.* 401. 526. *Salk.* 287. So

Discourse no evidence.

General customs, hearsay evidence, good.

When admitted.

Books of account.

Who are good witnesses.

Who not.

What persons interested may give evidence.

no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any *general customs, or matters of common tradition or repute*), the court admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of any particular facts. *1 Mod. 283.*

But though hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant to himself. *Ibid.* So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner, after the year, by stat. 7 Jac. 1. c. 12. nor of themselves, within the year, without some circumstances to make it so: but a servant who made the entry may have recourse to them to refresh his memory: and if such servant (who was accustomed to make these entries) be dead, and his hand-writing proved, the book may be read in evidence. *1 Salk. 285. Bull. 276.* The statute excepts accounts between merchant and merchant, in the usual intercourse of trade.

All persons, of what religion or country they may be, that have the use of their reason, are to be received and examined, except such as are infamous, &c. *Salk. 690. Bull. 288.* or such as are interested in the event of the cause; *Co. Lit. 6. Ib. 237.*; but it must be a present, not a future contingent interest. *1 Salk. 283. 257.* The husband cannot be a witness for or against the wife, nor the wife for or against her husband, because their interests are the same (unless in criminal cases). *Ibid.* Bail cannot be a witness unless exonerated. *Str. 436.* All others are competent witnesses, though the jury, from other circumstances, judge of their credibility. *Vide Str. 140. 1 P. W. 239. Str. 1122.*

But no other relation is excluded, because not absolutely the same in interest. *Bull. 283.*

A party interested for the sake of trade and the common usage of business, may be a witness, as a porter in a shop, or banker's clerk. *Ibid. 284.* So a party interested where no other evidence is reasonably to be expected,

expected, as on the statute of hue and cry. *Ibid.*
 So where he acquires the interest by his own act after
 the party, who calls him as a witness, has a right
 to his evidence. *Ibid.* *Skin.* 586. 3 *Lev.* 132. So
 where the possibility of interest is very remote. 2 *Lev.*
 231.

One witness, if credible, is sufficient to a jury of One witness.
 any single fact, though undoubtedly the concurrence
 of two or more corroborates the proof. *Carth.* 144.
 The civil law requires two. *Show.* 158. 3 *Mod.* 283.
 In actions on general acts of parliament the printed sta-
 tute book is evidence; but not on private acts. There
 the party must have an office-copy examined with the
 parliament roll.

Records exemplified under the broad seal may be Records.
 admitted in evidence. *Bull.* 223. But the exemplifi-
 cation of deeds under the broad seal cannot. *Ibid.*

If a verdict is to be given in evidence, an office-co- Verdict.
 py of the whole record must be made by the proper
 officer, examined and sworn to. *Gilb.* 25.

No verdict shall be given in evidence, but between
 such who are parties or privies to it, 1 *Ray.* 730.;
 with this restriction, that it is of a matter which was in
 issue in the former cause. *Hob.* 53. *Vide Carth.* 131.
 2 *Str.* 1151.

When a writ is only inducement to the action, the Writ.
 taking out the writ may be produced without any copy
 of it: but when the writ itself is the gist of the action,
 you must have a copy from the record. *Bull.* 230.
Vide 1 *Ray.* 753.

Where a deed is inrolled (pursuant to the statute), Bargain and sale.
 the indorsement of the inrolment is evidence without
 further proof. *Bull.* 225. 251. 3 *Lev.* 387. *Dougl.* 56.

Where a fine is to be proved with proclamations,
 the proclamations must be examined with the roll,
Ibid. *Allen* 13. *Clay.* 51.; and an office-copy of it,
 with the proclamations indorsed, is the best.

As to recoveries. When you shew a modern reco- Recoveries.
 very, you must prove seisin in the tenant to the *præcipe*.
 In an ancient recovery seisin will be presumed, espe-
 cially where possession is gone agreeable to it ever since.
 1 *Mod.* 117. *Vide Stat.* 14 *Geo.* 2. c. 20. *Vide* 2 *Str.*
 1109.

An answer to a bill in chancery is evidence against Bill and answer.
 the defendant, but the bill and answer must be read

from an office-copy, (ingrossed now on proper stamps, 2s. each sheet,) and sworn to be examined by the originals. The office-copies of depositions are evidence in chancery, but not at common law, without examination. *Bull.* 225. 231. 233, 234. A decree may be given in evidence between the same parties, or any claiming under them, 2 *Mod.* 231.; but cannot be read without the bill and answer. *Dougl.* 580.

Affidavit.

An affidavit made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn. 1 *Show.* 397. *Qu.* If his hand-writing should not be proved?

Posita no evidence of a verdict.

The barely producing the *posita* is no evidence of the verdict, without shewing a copy of the final judgment; because it may happen the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the parties, so as to introduce an account of what a witness swore at that trial, who is since dead. *Pratt C. J. Str.* 162. *Pitton v. Walter.*

Probate, &c.

Probate of a will, or letters of administration under seal, is good evidence as to the personal estate. *Bull.* 242. *Vide Ray.* 405. 1 *Sid.* 359.

Rolls of court baron.

The rolls of a court baron are evidence; for they are the public rolls by which the inheritance of every tenant is preserved. *Bull.* 243.

Register.

The register book itself of christenings, marriages, and burials, is good, or a copy of it (*copied exactly*;) examined by the original. *Ibid. Cro. Eliz.* 411. *Moor* 451.

Admission.

A copy of the admission to a copyhold estate is good evidence, 2 *Barn.* 406. examined by the court rolls.

General character.

In all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally. *Bull.* 291.

Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur.

In every issue the affirmative is to be proved; but when so proved, the other side may contest it with opposite proofs. But to this rule there is an exception of such cases, where the law presumes the affirmative contained in the issue. *Bull.* 293.

That no evidence need be given of what is agreed by the pleadings. *Ibid.*

That

That whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. *2 Roll. Ab. 682. Co. Lit. 283. 1 Jon. 240.*

If the substance of the issue be proved, it is sufficient. *Co. Lit. 282. Hob. 53. 55. 2 Roll. 706.* Substance of the issue.

Where the issue is joined on the point of the action, there *modo et forma* is mere form; and need not be proved. *Co. Lit. 281.* But when a collateral point in pleading is traversed, then *modo et forma* is of the issue, and must be proved. *Ibid.* Modo et forma.

If brief is in an ejectment cause, follow these rules: Ejectment.

1. Begin with the person seised in fee of the premises under whom the lessor of the plaintiff claims, deduce the title from such person so seised, setting forth the dates and contents of the conveyances, and state how they are executed, whether by livery of seisin, or by enrolment, by lease and release, or by fine and deed of uses; if in by purchase, prove the deed.

If witnesses are dead, prove they are so, and the hand-writing, with that of the grantor. If not an old title, prove the person seised and in possession, under whom you claim.

2. Though the common way is to call but one witness to prove the will, yet that is only where there is no objection made by the heir; for he is entitled to have them *all examined*, but then he must produce them; for the devisee need produce only one, if that one prove all the requisites. *Buller 264.* but he must prove the hand-writing of the other two. If claim by will.

In *Townsend v. Ives*, 1 *Wils.* 216. his Honor said, that *all the witnesses*, if living, must be examined to prove the will; and therefore refused to establish the will: the heir at law in this case, was an infant. *In Canc.*

3. If plaintiff is in by descent, prove the ancestor seised in fee under whom you claim, set forth and prove pedigree, which is generally put in the brief, that counsel may comprehend it without perplexity: also set forth defendant's title so far as you have knowledge, with observations. If by Descent.

For evidence necessary in actions of assumpsit, and notes, *vide my Modern Pleader.*

Poffea.

Postea.

When the cause is tried at the sittings in *London* or *Middlesex*, the associate delivers the party for whom the verdict has been given, the record, and he afterwards indorses the *postea* from the associate's minute on the panel.

The court fees are about 2l. 18s. 6d. for the plaintiff's verdict, on a nonsuit about 2l. 1s. defence 1l. 18s. If the cause is tried at the assizes, the associate keeps the record till the next term; and he indorses the *postea*; his fee is received for this at the trial.

No judgment given either for plaintiff or defendant, upon a writ of *nisi prius* or *Inquiry*, can be entered until the expiration of *four days exclusive* of the entry of a rule for judgment. *N. on R. E. 5 Geo. 2. Reg. 3.* The *four days* are computed *exclusive* of that day on which the rule was entered, and of that on which the judgment was signed. *3 Salk. 212.*

Rule for judgment.

Upon the return day of the *distringas*, give a rule for judgment on the *postea*, which enter at the clerk of the rules, and is given on a slip of paper thus: *A. B. against C. D. "Rule for judgment on postea,"* pay 1s. 10d.; this is a *four day* rule in *full term* (and *Sunday* or any *holiday* on which the court does not sit, is not to be accounted), and in case the rule be entered on the last day of term, or after, then *Sunday* is no day. At the expiration of *four days exclusive* after entering such rule, (*Sunday* or a *holiday* not intervening,) judgment may be entered. *N. on R. E. 5 Geo. 2.* Within which four days, the party against whom the verdict passed may move the court in *arrest of judgment*, or for a *new trial*; if neither of these be done, stamp the *postea* with a double 2s. 6d. get the *postea* marked *deliberatur*, with *Mr. Nelson*, clerk of the common bails, pay him 6d. take same to the master, who will tax the costs *de incremento*, and sign *final judgment*, then take out execution.

If tried in term.

If the cause be tried the day before the last day of the term, a rule for judgment *may that day* be given, if proceedings be *by bill*, and on the *last day* of that term; if defendant means to arrest the judgment, he must move.

But

But if it be tried the sitting *after* term, such rule cannot be given till the *first day in full term* of the next term; for all judgments must be given in the term *se-dente curia*.

If either of the parties die, execution cannot be taken out upon the judgment, till a *sci. fa.* sued out, and judgment thereupon obtained. *Stat. 8 & 9 W. 3. c. 10.*

Death of either party.

The rule ought *not* to be entered before the day in bank, and is not necessary if the plaintiff be *non-suited*; for in that case, judgment may be entered immediately *after* the day in bank. *N. on R. E. 5 Geo. 2. Reg. 3.*

Rule ought not to be entered before day in bank.

If the action be by original, the rule may be given on the return day of the *distringas* (if it does not happen on a *Sunday*), if cause tried in the term; but if cause tried the sittings *after*, then on the *first* day of the next term, and not before.

If by original on return day of *distringas*.

If plaintiff become bankrupt between interlocutory and final judgment, yet final judgment may be entered in the name of the plaintiff, but execution cannot issue without a *scire facias*. *2 Wils. 358.*

Bankrupt.

Taxing Costs.

If there be extra costs, an affidavit of expences is necessary to be made before taxation: in country causes, affidavits are generally made, and if sworn there, must be filed with the clerk of the rules first, who makes a copy for the master, pay him 8d. *per sheet* besides duty.

Ordered, that all affidavits sworn before a commissioner in the country to be brought to the clerk of the rules, to be filed in such convenient time, that copies of them may be made and delivered to the party filing the same. *R. M. 9 Geo. 2.*

Affidavits sworn in the country to be filed before read.

It is usual, amongst fair practisers, to give the opposite side notice of taxing costs, without a rule; but if not, he may apply to the clerk of the rules for one to be present, pay 4s. 6d. serve copy on the attorney of the other side; he cannot tax them without notice, if there be a rule, which is to be given the preceding evening.

Rule to be present.

In the King's Bench.

A. B. plaintiff, and *C. D.* defendant.

A. B. of, &c. the plaintiff in this cause, and *E. B.* of, &c. attorney for the above-named plaintiff, severally make

Affidavit to increase the costs.

But

The attorney's clerk is not to make this affidavit.

make oath, and say, and first this deponent *E. B.* for himself saith, That notice of trial was given in this cause for the last assizes to be holden at *Oxford*, that he did cause three subpoenas to be issued out on the part of the said plaintiff; and that *A. L.* of, &c. *C. L.* of, &c. *E. T.* of, &c. *G. H.* of, &c. *J. K.* of, &c. (here insert the names of the witnesses, and their places of abode, with their addition of trade, &c.) were all of them severally subpoena'd on the part of the plaintiff, and that the place of residence of the said *A. L.*, *C. L.*, and *G. H.* is distant from this deponent twelve miles: And this deponent further saith, That all the said witnesses were material and necessary for the said plaintiff; and that the said *A. L.*, &c. were all paid with their subpoenas 1s. each, and that the said *A. L.* &c. (here again name the witnesses) were necessarily absent from their places of abode in going to and returning from the said assizes *three days*; and this deponent was also necessarily absent from his place of abode three days, and that the usual place of abode of the said *A. L.* is distant from *Oxford* thirty-seven miles; that the usual place of abode of the said *C. L.* is distant from *Oxford* aforesaid ten miles (go on here and shew the distance of every witness from the assize town): And this deponent further saith, That the said *A. L.* was very old and infirm, and that he was obliged to hire a post-chaise for her, from her place of abode to the said assizes, and back again, (she the said *A. L.* not being able to travel in any other way,) and that he did pay for the same the sum of 5l. 10s. and that he did also pay to her for her loss of time, trouble, and expence, the sum of 4l. 4s.: And this deponent further saith, That he did pay to the said *C. L.*, *E. T.*, *G. H.*, &c. for their loss of time, trouble, and expence, the sum of 3l. 10s.: And this deponent further saith, That his brief consisted of five sheets of paper, and that he did pay to Mr. — with his brief and clerk, 4l. 6s. 6d. and to Mr. — and his clerk, 2l. 4s. 6d. and the following court fees; to the marshal for entering the cause 18s. to the jury, tipstaff, and bailiff, 14s. to the marshal and crier, 17s. and to the associate, 1l. 15s. 6d.; and this deponent *A. B.* for himself saith, that he did pay for the expence, of himself and witnesses pending the said trial, the sum of 5l. 10s. 6d.

The brief ought to be produced to the master.

Sworn, &c.

It

It is impossible to form a general precedent for an affidavit of increased costs, as every cause varies so much in expence and circumstances, therefore state the facts *with certainty*, as the master cannot ascertain the expences of the witnesses without; and with that shew, "*that every thing is necessary and material, as far as belief goes, to be produced on the part of your client; the place of abode of the witnesses must also be shewn, with their distance from the place where the assizes are held,*" otherwise they cannot be allowed for.

Verdict.

A verdict, *vers dictum*, is either *privy* or *public*. A *privy verdict* is when the judge hath left or adjourned the court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from their verdict; so that the privy verdict is indeed a mere nullity, and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict, in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.

N. B. If the judge hath adjourned to his own lodgings, and there receive the verdict, it is a *public* and not a *privy* verdict. *Co. Lit. 227.*

Special Verdict.

Sometimes if there arises in the case, any difficult *Special verdict*. matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special verdict*, which is grounded on the *stat. W. 2. 13 Ed. 1. c. 30. f. 2.* whereby it is ordained, that the justices assigned to take assizes, shall not compel the jurors to say precisely, whether it be *disseisin* or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is *disseisin*, their verdict shall

shall be admitted at their own peril, and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally. "that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff: if otherwise, then for the defendant."

Special verdicts, counsel to subscribe the points.

By rule, *M. 1654, sec. 20*. In finding of special verdicts where the points are single, and not complicated, and no special conclusion, the counsel (if required) do subscribe the points in question, and agree to amend the omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment.

Deeds to be found according to the substance.

That unnecessary finding of deeds *in hæc verba*, where the question rests not upon them, but are only derivation of title, to be spared, and found shortly according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. *Ibid.*

Where there is a special verdict or case at the sittings, it is dictated by the court, and signed by the counsel before the jury are discharged. If in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact is stated accordingly. They must now be set down in the paper for argument within four days; and argued in course as they stand; they cannot be put off but upon motion made a day or two before, for reasons appearing by affidavit. 1 Burr. in preface, p. 6.

The jury must find facts, and not evidence of facts. The court can intend nothing but what is found in a special verdict. 1 Wilf. 55. Hob. 262. 2 Stra. 1185.

How to proceed.

If there be a special verdict found, the plaintiff's attorney generally gets the same drawn and settled by his counsel, who signs the draft, then delivers it over to the opposite attorney, who gets his counsel to sign it; when both have signed, it is then left with the clerk of the nisi prius, in a town cause; or with the associate, if a country cause, who makes copies for each party; the whole proceedings are then entered in form on the roll, docketted, and filed of record; after this move for a consilium, take consilium paper to the clerk of the rules, who draws up the rule for counsel to be heard, pay 4s. 6d. take same again to the clerk of the papers,

The consilium is moved for in the same manner as on demurrer.

he

he will enter the cause upon producing the rule, pay is. serve same on the attorney for the defendant.

Copies of the *whole record* and *special verdict* are to be made for the judges, the plaintiff's attorney to deliver *two* to the *chief justice* and *senior judge*, the defendant's attorney to the two other judges, *two days* before argument. Also counsel must have their briefs, with a copy of the *whole record* and *special verdict*. Rule E. 2 Jac. 2.

To be delivered to the judges two days.

Be the verdict in whose favor it may, the rule of court is drawn up, and costs taxed immediately, without a rule being given for judgment, there being a special rule for the *poslea* to be delivered to the successful party, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, same as in other cases.

Of taxing costs.

If the counsel cannot agree in the statement of the facts, application may be made to the judge to state them according to his minutes, by summons. If the special verdict is not agreed on previous to the *four days*, still a *concilium* may be moved for afterwards, the delay being occasioned by *both parties*; but generally it is settled in time.

If counsel do not agree in statement of facts.

But it is said, by the clerk in the office, that special verdicts should be set down to be argued *within the first four days of the term*, otherwise it must be mentioned to the court on the motion for a *concilium*.

Special Case.

Another method of finding a species of special verdict, is when the jury find the verdict generally *for the plaintiff*, but subject nevertheless to the opinion of the court above, on a *special case* stated by the counsel on both sides with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision; the *poslea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a *writ of error*, if dissatisfied with the judgment of the court upon the point of law.

Special case.

Barn. 460.

How to proceed.

If a special case is made, then it is settled by the two counsel and signed, give same to Mr. Lowten the clerk of the *nisi prius*, if a town cause, (*country cause to the associate*,) who will make copies for each party, move for a *concilium* by counsel, get the rule from the clerk of the rules, set the case down with the clerk of the papers, and proceed the same as on a *special verdict*; copies for the judges also to be delivered *two days* before argument.

When to be set down.

All special cases from the assizes are to be set down for argument *within the first four days of the following term*, and never to be set down any of the last four days. *Cutter v. Powell, Hil. 35 Geo. 3.*

What it ought to state.

In a case for the opinion of the court, the *facts* proved at the trial ought to be stated, and not the *evidence* of the *fact* only: thus in trespass on a copyhold, it is not enough to state that admission of plaintiff was proved, but must state that plaintiff had *title or possession*. 2 *Wils.* 163. *Palmer v. Johnson.*

The court will judge only on the case *as stated*; if *mis-stated*, you may apply to amend it. 1 *Burr.* 617. *Doe v. Lewis.* If the case be so defective as the court are not able to give judgment, they will grant a new trial. 1 *Str.* 300. 3 *Term Rep.* 507.

Arresting the Judgment.

After judgment on demurrer.

Arrests of judgment arise from *intrinsic* causes, appearing upon the *face of the record*; for a judgment can never be arrested but *for that which appears on the face of the record itself*. Lord Ray. 232. 4 *Burr.* 2287. After judgment on *demurrer*, there can be no motion in arrest of judgment, for any exception that might have been taken on arguing the demurrer; the reason is, that the matter of law having been already settled, by the solemn determination of the court, they will not afterwards suffer any one to tell them, that the judgment they gave, on mature deliberation, is wrong; but it is otherwise after judgment by default. *Edwards v. Blunt*, 1 *Str.* 425.

No motion without roll or *poslea*.

It is said, no counsel ought to move any thing in arrest of judgment, except the roll wherein the judgment is entered, or the *poslea* be in court. 2 *Lill. Praet. Reg.* 120. 1 *Salk.* 78. *Mod. Cas.* 24. But frequently the plaintiff's attorney does not file his roll, therefore

therefore in this case, I should think, after a writ of inquiry executed, counsel may move without it. In London and Middlesex the successful party has the *posse*, therefore he should have notice to produce it on the motion: If a country cause, the associate will attend with it in court, pay him 6s. 8d.

The general rule is to move it within the *four days* given by the rule for judgment. But *Sunday*, or a *dies non*, is not a day. 4 Burr. 2130. When it may be moved.

If the inquisition or *disfringas* be returnable the *last day* of the term, the motion must be made on *that day*. Lill. Praet. Reg. 120. Note on Rule, East. 5 Geo. 2. Reg. 3. (a).

It is now determined, that a motion may be made at any time before the judgment is entered up, Dougl. Rep. 746. Taylor v. Whitehead, and after motion for a new trial is discharged^a, *ibid.* 1 Burr. 334.; and if the judgment be arrested, each party pays his own costs. May be made before judgment signed. Costs.

A motion in arrest of judgment, cannot be made till demurrer determined, though there be a verdict on the issues. Andr. 282. Not to be made till demurrer determined.

This motion is made without notice to the opposite party, and it is a rule to shew cause; fee not less than a guinea to counsel. Without notice.

The court *after verdict* will do every thing they can to help the declaration. 2 Burr. 899. 1 Salk. 29. After verdict.

After verdict, the court will suppose every thing proved at trial which was necessary, unless the contrary appear on the record. 1 Wils. 255. Bull v. Steward. But not after judgment by default. 2 Burr. 899. Collins v. Gibbs.

The plaintiff, on an issue tendered by the defendant, joined the issue thus: "*and the aforesaid defendant doth the like,*" instead of saying, "*and the aforesaid plaintiff doth the like,*" and this being objected in arrest of judgment, the objection was over-ruled, and the judgment established. 4 Burr. 1793. Harvey v. Peake. 2 Str. 117. Cromp. 376. contra.

Judgment shall not be stayed after verdict, by reason of mistaking the names of the plaintiff and defendant. Mistake in names. Stat. 16 & 17 Car. 2. c. 8. 1 Black. 40.

^a In such case it is usual for counsel to state, and have leave of the court for that purpose, when he moves for a new trial, otherwise when motion for a new trial is discharged, he may not have an opportunity in time to move to arrest the judgment.

If *defendant's* name be put in *two* counts, instead of *plaintiff's*, court will not arrest the judgment. 3 *Wils.* 40.

After verdict, a man may alledge any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 *Roll. Abr.* 716. And judgment after verdict, shall not be arrested for an objection that would have been good on demurrer. 3 *Burr.* 1725. *Weston v. Chapman.* *Str.* 425.

Verdict will aid title.

A verdict will aid a title defectively set out, but not a defective title. 2 *Str.* 1011. 1023. 1 *Burr.* 301. 2 *Burr.* 1159. 4 *Term Rep.* 472. *Vide also Doug.* 679. 683.

If rule discharged.

If the rule be *discharged*, then plaintiff's attorney draws up the rule, and may proceed to tax his costs in the usual way on the *poslea* or *inquisition*.

If arrested.

If judgment be *arrested*, the defendant's attorney draws up the rule, and serves copy. *Cowp.* 407.

If the defendant does not move in time, he still may bring his writ of error.

New Trial.

Venire de novo, when may be granted.

New trials were granted before 1655. *Sty.* 462. 466. A *venire de novo* is the ancient proceeding of the common law, a new trial is only a new invention; the first is as ancient as the law, when attainments were in use, but motions for new trials were introduced in this manner; the judgment in attainment was very severe, and the punishment excessively hard, and therefore to avoid that severity, it was thought better to proceed in a milder way, and so motions for new trials were introduced; they likewise differ in this respect, that new trials are generally granted where a *general verdict* is found; a *venire facias de novo* upon a *special verdict*; but the most material difference between them is this, that a *venire facias de novo* must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it, if the record be never so right. If the verdict appear contrary to the evidence given, or the judge has given wrong directions, a new trial will be granted; but it is otherwise as to a *venire facias de novo*, which can only be granted in these two cases: 1st, If it appear upon the face of the verdict, that the verdict is so imperfect, that no judgment can be

How motions for new trials were introduced.

Ven. fac. de novo.

be given upon it. 2d, Where it appears that the jury ought to have found other facts differently; and it cannot be granted in any other case. *Ld. C. J. Willes. Leybourn v. Lewis, 1 Wilf. 55.*

A general verdict can only be set right by a new trial. 1 *Burr.* 393. Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences, the jury may mistake and infer directly contrary to law: The parties may be surprised by a case *falsely* made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial: And it is done in a way very favorable to the parties for whom the wrong verdict is given; it is *upon payment of costs*: Whereas in other cases, where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance. *Lord Mansfield, Bright v. Eynon, 1 Burr.* 393. The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances. Of late years, they have been granted not only after *trials at nisi prius*, but also after *trials at bar*. *Ibid.* 395.

It must depend upon the *legal discretion* of the court, guided by the *nature and circumstances* of the particular case, and directed with a view to the *attainment of justice*. *Ibid.* 397.

Trials by jury in civil causes could not subsist now, without a power somewhere to grant new trials. 1 *Burr.* 390.

Though a motion for a new trial is an application to the *discretion* of the court, it must be remembered, that the discretion to be exercised on such an occasion, is *not a wild but a sound discretion*, and to be *confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself*. And that discretion will be best exercised by not deviating from the rules laid down by our predecessors; for the practice of the court, forms the law of the court. *Lord Kenyon. Wilson v. Rastall, 4 Term Rep.* 757.

Where parties have agreed to abide by the verdict in *one action*, (where several are depending,) it means

Costs.

Discretionary.

The discretion of the court to be a sound one.

Many actions to abide event of one.

such a verdict as court thinks ought to stand as a final determination, and this therefore, does not prevent a motion for a new trial. *Hodgson v. Richardson*, 3 Burr. 1477.

Quo warranto.

A new trial may be had in an information on a *quo warranto*, being in the nature of a civil proceeding. 2 Term Rep. 484. *Rex v. Francis*.

Non suit.

So after a nonsuit, if improperly directed. 4 Burr. 1986. *Sadler v. Evans*. 5 Burr. 2612. *Rich v. Shute*.

New trial, what.

A *new trial* is retrying the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken in the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case. A sufficient ground must, however, be laid before the court, to satisfy them, that it is necessary to justice that the cause should be further considered, nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case.

Criminal cases
when moved for.

If the defendant do not move for a new trial in a criminal case *within the four days*, he cannot be heard at all on the subject of a *new trial*; all that he can do is, to move in *arrest of judgment*, which may be done at any time *before judgment* is pronounced, or address himself to the court in *mitigation* of the *punishment*; and if, in the course of that address, it incidentally appear that justice has not been done, the court will interpose of themselves. *Rex v. Holt*, 5 Term Rep. 445.

If judge dies.

And it seems if a *judge dies* between the circuit and the following term, motions for new trials are to be made upon affidavit. *Ibid.* 439. *Lord Kenyon*.

Action by a
servant against
master.

In assault and battery the evidence was, that plaintiff, who was a servant to the defendant, after having received a slight blow from his master for impertinent behavior,

behavior, violently beat him.—Verdict 40l. The court granted a new trial as being excessive. *Jones v. Sparrow*, 5 Term Rep. 257.

The want of due notice of trial, unless the defendant makes a defence, is a good ground for a new trial. 2 Salk. 646. For want of due notice.

When not granted.

If out of three issues two are found against evidence, yet if the material issue be agreeable to evidence, no new trial. *Dexter v. Barrowby*, Bull. 326. Vide *Rex v. Pool*, same page.

If a verdict is against evidence, yet if the action was frivolous and vexatious, and the real damage small, court will not grant it: which should be to attain real justice, not to gratify litigious passions, on every point of *summum jus*. 1 Burr. 11. *Mackrow v. Hull*. If against evidence, and action frivolous, will not grant it.

The court will not grant it for excessive damages, when they depend on circumstances solely under the cognizance of the jury, and fit for their decision; as for *crim. con.* For the injury suffered by the husband, and the estimate of the damages to be assessed, must in their nature depend entirely upon *circumstances*, which it was strictly and properly the province of the jury to judge of, the court could not say 500l. was too much, or that 50l. was too little. 1 Burr. 609. *Wilford v. Berkeley*. Nor for excessive damages, where, &c.

Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict, ought always very strongly to preponderate. Vide *Str.* 1142. *Ashley v. Ashley*. Nor on nice or formal objections, which do not go to the *real merits*. Nice or formal objections.

In *Ducker v. Wood*, Lord Mansfield said, That there was no doubt but that the court had the power of taking the opinion of a second jury in any case where the damages were excessive; but these questions depended on their own circumstances, on which the court would exercise their discretion. 2 Term Rep. 277. Vide 2 Wils. 405. 3 Wils. 62. Power of court to grant, &c. where excessive damages.

There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested. There never yet has been a case in which the party has been permitted *after trial* to avail himself of any objection, which was not made at the time of the examination. Where it appears that No instance of new trial on account of witnesses being interested;

that one or more material witnesses who were examined on a trial were interested, it may afterwards weigh with the court as a circumstance for granting a new trial, provided the merits of the case are doubtful; but, as a *substantive* objection, I am clearly of opinion that it ought not to be allowed. Per *Buller J. Turner v. Pearte*, 1 *Term Rep.* 720.

unless the merits are doubtful. No new trial where it appears you might have given evidence, on the former one. New trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes, if once a door was opened to this. *Cooke v. Berry*, 1 *Wils.* 98. 1 *Term Rep.* 84. *Gift v. Mason*, *Salk.* 647. *Str.* 691. 2 *Term Rep.* 113.

If jury toss up. If jury toss up for the verdict, and that can be made appear by a *third person* seeing them, court will set aside the verdict. *Vasie v. Delaval*, 1 *Term Rep.* 11. *Str.* 642. Vide 2 *Black.* 1293.

Under-sheriff. If an under-sheriff be attorney in the cause, and returned the panel of the jurors, court will grant a new trial. *Cowp.* 112. *Boylis v. Lucas*.

Evidence on both sides. No new trial shall be, where there was evidence on both sides, though a verdict be against the judge's opinion who tried the cause. *Anon.* 1 *Wils.* 22.

On affidavit of jurymen. The court will be very cautious how they grant new trials upon the affidavits of jurymen; because it would be of very dangerous tendency. 1 *Wils.* 330. *Rex v. Simmons*.

Bill of exceptions. When there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. *Fabrigas v. Mostyn*, 2 *Black.* 929.

Affidavits to explain. Court will not admit affidavits to explain evidence, to found the motion. 1 *Wils.* 257. *Hanson v. Parker*.

If verdict be from a slip or inadvertence. If a verdict arise from a *slip* and *inadvertence*, as the want of producing an office copy of the judgment, and where the plaintiff has no merits, such recovery is manifestly contrary to reason and justice, and new trial granted. *Martyn v. Podger et al.* 5 *Burr.* 2631.

If witness concealed. If a witness for defendant be concealed in plaintiff's house to avoid being served with subpœna, though plaintiff have a verdict, yet court will grant a new trial. *Montpeyson v. Randall*, *Bull.* 328.

Motions for new trials are encouraged. Motions for new trials have been very much encouraged of late years, and I shall never discourage them;

them; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind. The court and the counsel are enabled to consider the question more fully than they could do in the hurry of business at *nisi prius*. Value alone is not a ground for a new trial, although it frequently weighs in granting a rule to shew cause. Per Buller J. *Vernon v. Hankey*, 2 Term Rep. 120. It is not sufficient that the cause is of value, or of importance, but it must also involve in it, a doubt to induce us to grant a new trial. The suitors frequently derive great benefit from having their causes thoroughly investigated on such motions; for it often happens by some accident, that complete justice is not done at *nisi prius*; but unless it appears to be of doubt, it would be unjust to send the parties to another trial. Per Grose J. *Ibid.* 123. Value.

When to be moved.

If the party against whom the verdict is obtained wishes for a new trial, the same must be moved for within four days inclusive, *Birt v. Barlow*, Dougl. Rep. 171. including the first day, as if term begins 21st, it must be moved 24th, (unless Sunday or a *dies non* intervene, or some material circumstance which must be shewn on affidavit of the delay,) and the motion is generally made on an affidavit (unless it arise from a verdict given contrary to evidence, a misdirection of the judge at *nisi prius*, 2 Wils. 273. or where the jury have given excessive damages,) of some new matter being discovered since the trial. When to be moved for.

The court will not grant a new trial in penal actions, 3 Wils. 59. *Fonereau v. Bennett*, 1 Wils. 17. *Jervis v. Hall*, 2 Str. 899.; unless on account of a mistake or misdirection of a judge; *Wilson v. Rastall*, 4 Term Rep. 753. For there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. If the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion; indictments are excepted. Lord Kenyon. Penal actions.

In this cause Mr. J. Buller says, the note in 1 Wils. is too loose to be relied on. But in 3 Wils. *Fonereau v. Bennett*, the court said, we never grant new trials in

in actions on *penal laws*, and it has been so held for more than fifty years past. This was an action for *bribery*, verdict for defendant. And in *Mattison qui tam v. Allanson*, the jury found for defendant contrary to plain evidence, and the court denied a new trial, there being no proof of any misbehaviour in the defendant, or tampering with the jury. 2 *Str.* 1238. And this is within the reason of cases in the exchequer, where verdicts for defendant are never set aside for penalties, in the case of duties.

If judge be
wrong in his
direction in
point of law.

In *Calcraft v. Gibbs*, which was debt for a penalty under the game laws, verdict for defendant. Motion for a new trial on a *misdirection* in point of law by the judge, Lord *Kenyon* said, where there is any ground of objection to the law delivered by the judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is. The application for a new trial is a direct appeal to the justice and laws of the country, and cannot be tried and disposed of by any other rule. *Rule absolute.* 5 *Term Rep.* 19.

Mal. pros.

The court refused a new trial where verdict was for defendant, in an action for a malicious prosecution. *Cowp. Rep.* 37. *Norris v. Tyler.*

Illegality of a
policy.

A new trial will not be granted to give the defendant an opportunity of proving the *illegality of a policy*, which was not illegal on the face of it; for he should have shewn it on the trial. 1 *Term Rep.* 84. *Gist v. Mason.*

Evidence at first
trial.

The court will not grant a new trial to let the party into a defence of which he was apprised at the first trial. *Vernon v. Hankey*, 2 *Term Rep.* 113.

If justice be
done.

Where there is complete and substantial justice done, there is no reason to grant a new trial: by all the judges. *Edmondson v. Machell*, 2 *Term Rep.* 4.

Second time
granted.

A new trial may be granted a second time, if the reasons for granting are sufficient. 4 *Burr.* 2108. *Goodwin v. Gibbons.* So a third trial, if verdict against law. *Tindal v. Brown*, 1 *Term Rep.* 167. So if against evidence. *Wilson v. Brough*, E. 24 *Geo.* 3. *Sell.* 50.

Ejectment.

A new trial may also be granted in ejectment, and after a trial at bar. 4 *Burr.* 2224. *Str.* 1105. *Smith v. Parkhurst.*

In

In an action for a libel, it was refused, though found for defendant, against the evidence, because there was no real damage proved, and injury trivial; and courts of justice will not assist the passions of mankind. *Dr. Burton v. Thompson*, 2 Burr. 665. Judge certified 2s. 6d. would have been too much.

Refused in an action for a libel.

No new trial, if defendant, an auctioneer, pays money into court. *Burrough v. Skinner*, 5 Burr. 2639.

A new trial will seldom be granted in cases of personal torts for excessive damages. *Cowp Rep.* 230. It ought not to be granted merely for the sake of turning the party round; but where substantial justice cannot otherwise be obtained. *Ibid.* 601.

Personal torts seldom granted.

The court refused a new trial for *excessive damages* in *crim. con.* Mr. J. Ashburst said, We have no right in such a case, to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages. *Duberley v. Gunning*, 4 Term Rep. 651.

Crim. con.

A writ of inquiry may be set aside for smallness of damages, *Str.* 1259, or excessive.

Inquiry.

It would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before. *Price v. Brown*, *Str.* 691

Setting up new evidence.

Where a jury have found for plaintiff upon a *presumption contrary to evidence*, the court will not grant a new trial, if he be entitled to recover in *conscience and equity*. *Wilkinson v. Payne*, 4 Term Rep. 468.

If plaintiff recover in conscience.

In the case of new trials, it is a general rule, that in a *hard action*, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a *new trial*, where the objection does not lie in point of law. In an action on the game laws, it was suggested, that the gun with which the defendant fired, was not charged with shot, but that the bird might have died in consequence of the fright; the jury found for the defendant, and the court refused a new trial. *Lord Kenyon*. 4 Term Rep. 469 S. C. *Buller J.* If the verdict be *consistent with the justice, conscience, and equity* of the case, we ought not to grant a new trial. 470.

In action on the game laws, verdict for defendant, no new trial.

How

How to move.

How to move
for a new trial.

^a It is a rule to shew cause, therefore unnecessary to give notice to the opposite party; draw up rule and serve it, and the day before it comes on to be heard, speak to the *chief justice's clerk*, or *judge's clerk*, who tried the cause, to bring his book to *Westminster*; if it be a judge of another court, serve his clerk with a copy of the rule *nisi*, the judge will deliver his report to the *puisne judge of the court* within the time mentioned in the rule; it is better to serve the rule (though generally the *puisne judge* writes to the judge who tries the cause for his report, or waits on him).

Bull. N. P. 327.

If the judge on the report declares himself satisfied with the verdict, it will be difficult to obtain a new trial; on the other hand, it is pretty much of course to grant the rule. It is usual (if known) for the opposite side to attend, and observe upon what grounds the motion is made, so that he may be able to instruct his counsel to shew cause, though this attendance is not allowed in taxed costs.

Court divided.

If the court be *divided*, no rule is made, but the party may apply to be at liberty to sign his judgment. Vide *Barn.* 442.

If Verdict set aside.

If verdict set
aside, how to
proceed,

If the verdict should be set aside, draw up rule and serve it; and if on payment of costs, they must be *forthwith paid*, the rule being conditional; or plaintiff may move the court for liberty to enter up the judgment, and take out execution; If the costs are paid, then the *nisi prius record* is not to be ingrossed a-new, unless the *postea* be indorsed on the back; if it is, Mr. *Provost* will not pass the old record again. N. B. The *jurata* must be altered, as to the *return*, and the record must be passed again; but no new entries are made or paid for; a new *venire* and *disfringas* must be sued out and returned as in common cases, and cause set down a-new; and also notice of trial must be given a-fresh.

If plaintiff does not proceed to a *new trial*, the defendant must carry record down by *proviso*, not being entitled to judgment as in the case of a nonsuit.

^a The brief on the former trial is to be given to counsel, see discretionary with such observations as are necessary, and copy of the affidavit, unless moved on the face of the evidence.

If a new trial is granted on account of an *irregularity*, costs are of course: If by *mistake* of the judge in point of law, it may be ordered without costs, 1 *Black. Rep.* 670.; by unfair practice, if verdict obtained, no costs, 1 *Burr.* 352.; mistake of the jury, on verdict contrary to evidence, or excessive damages, it is granted on payment of costs; 12 *Mod.* 370. *Str.* 642. 1 *Burr.* 12. 393. 2 *Burr.* 665. And where the costs of the former trial are not ordered to be paid, nor directed to abide the event of the suit, each party must pay his own; and the party ultimately succeeding is not entitled to them. *Dougl.* 437. *Mason v. Skurry*, 3 *Term Rep.* 507. If the rule is *discharged* on motion for new trial, costs are allowed, though the rule does not express it.

Costs.

Costs of former trial not ordered, each party to pay.

Entry of Pleadings.

Of entering Pleadings on the Roll, and docketing same.

THE roll, or entry of the *issue*, or pleadings between the parties, is to be entered in a full fair hand, with a large margin of an inch at least, and a convenient distance at the top, for the binding up of the same, and at the bottom, that the writing be not rubbed out, *R. Hil.* 1657; and when you have occasion to write on the back of the roll, begin over against the first line of the first warrant of attorney, leaving a margin as on the other side.

The manner of making the entries.

By rule, *Mich.* 5 *Ann.* every attorney shall bring in all his rolls into the office fairly ingrossed by the times limited by the former rules; the rolls of *Trinity*, *Michaelmas*, and *Hilary terms*, before the *essoign* day of every subsequent term, and the rolls of *Easter term*, before the first day of *Trinity term*.

Rolls to be brought in.

No rolls to be received or allowed for by the clerk of the treasury, unless *marked* by the person appointed by the chief justice to deliver out rolls. *Trin.* 12 *Geo.* 2. 1738.

Rolls to be marked.

Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. *R. E.* 4 *fac.* 2.

Warrants of attorney.

The *custos brevium* now indulges the attorneys by attending at the *King's Bench* office the day but one before

Indulgence allowed.

Where to begin
on the roll.

before every term, except *Trinity*, when he attends the day preceding that term, to receive and file their rolls.

The space or room here spoken of for the entry to be left for the press, is made by the clerk appointed to deliver out the rolls, now Mr. *Adams* of *Lincolns-Inn*, stationer, who puts a stamp in the middle of the roll, near where the file goes through; two inches below which, you enter in a large hand thus: "*Also of the term of Easter, 36 Geo. 3. 1796, Witness Lloyd lord Kenyon;*" then enter the warrants of attorney for the plaintiff and defendant, thus:

Plaintiff's
warrant.

Middlesex (ff) John Doe puts in his place James Strong his attorney, against Richard Roe, in a plea of trespass on the case.

Defendants.

Middlesex, (ff) The said Richard Roe puts in his place James Ward his attorney. at the suit of the said John Doe, in the plea aforesaid.

Nature of the
action to be
expressed.

The nature of the action must be expressed in the warrant of attorney, according as the case shall be, as thus: "*in a plea of trespass and assault; in a plea of trespass, assault, and false imprisonment; in a plea of trespass on the case; in a plea of trespass and ejectment; in a plea of debt; in a plea of trespass; in a plea of detainue.*"

Middlesex. (ff.) Be it remembered that [here enter the whole issue thereon].

All issues joined are to be entered on the roll (*by bill*) the term in which they are joined.

All interlocutory judgments are entered on the roll (*by bill*) the term in which they are signed.

Issues by original may also be entered on the roll the term in which the issue is joined, as the want of an original cannot be assigned for error after verdict.

But if declaration by original be of one term, and interlocutory judgment of the next, or any succeeding term, then the entry on the roll should be the term the declaration is of, with imparlances from term to term, till judgment signed; unless you can procure the original, returnable the same term the judgment is signed, as the want of an original may be assigned for error. 1 Wils. 181.

Interlocutory or
other judgment,
of what term to
be entered.

If judgment is signed by warrant of attorney, the entry is to be of that term you enter it up in. If the plaintiff be non-pressed, either for want of declaring, replying, or entering his issue, on record, you may enter both

both warrants of attorney on the roll^a. No plea roll to be filed after the term following that of which it ought to be filed. *R. E. 9 W. 3.* unless leave be given; but now they are accepted by paying a *post terminum*.

The warrants of attorney are supposed to be filed at the commencement of the action. *1 Ld. Raym. 509.* and *R. E. 4 Jac. 2.* Nonpro.

When all the proceedings are in *one* and the same term, an original in *that* term will warrant same; but an original of the term *final judgment* is given, will not warrant them, if there be proceedings of a *preceding* term, as an *interlocutory judgment*. *1 Wils. 181.* Of the original writ.

If the roll be not carried in and filed, as of the term *issue is joined*, then you will have to pay a *post terminum*, which is 4s. 8d. and 1s. more for the docket; also the clerk will charge you a *post diem*, one day before the term begins, if your roll is not filed in time. Post terminum.

Go to the clerk of the judgments, King's Bench office, (if it is in the same term the *issue* is entered, or judgment signed,) with whom the docket or number rolls are left, and get of him as many numbers as you want, subscribe your name to the *docket* produced on parchment, then make out a *docket* paper; but if your *docket* is of a *preceding* term, then get a number roll at the *nisi prius* office, *Westminster*, or at Mr. *Edge's* office first, for which you pay 4s. 8d. carry the roll to the clerk of the judgments, and he will enter it. Make out your *docket* paper thus: Docketing rolls.

The entry of *C. K.* gentleman, one, &c. of the term of *Easter*, 36 *Geo. 3.* 1796. Docket paper.

London.	Issue joined in case between <i>J. D.</i> plaintiff, and <i>Richard Fenn</i> , defendant, on a plea of <i>non assumpsit</i> .	Roll. 500
Middlesex.	The like issue in assault, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, on a plea of not guilty, and <i>son assault demesne</i> .	501
Middlesex.	The like issue in debt, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, on a plea of <i>non est factum</i> .	502
Surry.	Judgment by default in case, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant.	503

^a And the defendant makes his entry in all cases, the *same* term the *non-pro* is signed, with proper continuances to that term.

<i>Surry.</i>	Judgment by confession, between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 64l. debt, and 63s. costs.	504
<i>Middlesex.</i>	Judgment by <i>nil dicit</i> , between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 600l. debt, and 63s. damages.	505
<i>Middlesex.</i>	Entry of two <i>scire facias</i> 's in debt, between <i>John Doe</i> , plaintiff, and <i>Richard Roe</i> , defendant, for 1000l. debt, and 63s. damages.	506
<i>Middlesex.</i>	Entry of one <i>scire facias</i> between, &c. with an award of the second for 1000l. debt, and 63s. damages.	507
<i>Middlesex.</i>	Judgment of <i>assets in futuro</i> between <i>A. B.</i> plaintiff, and <i>C. D.</i> executor of <i>J. D.</i> deceased, defendant, for 100l. debt.	508
<i>Middlesex.</i>	Non-pros for not declaring between <i>A. B.</i> plaintiff, and <i>C. D.</i> defendant, for 40s. costs.	509

Take this docket paper to the clerk of the judgments, and, if all the entries are paid for, he will mark the roll, by putting his stamp thereon; pay 3s. then go to the clerk of the treasury, who waits without that office, and give the rolls to him; he pays you 4d. for every roll, and afterwards files them in the treasury.

Clerk of the
treasury enters
final judgments.

If the roll is already carried in, which is often the case after issue is joined, and before trial, the *poslea* or *inquisition*, with the master's *allocatur* thereon, is to be taken to *Westminster* to the treasury, and the clerk on leaving it, will enter the judgment thereon; pay him 2s. for *poslea*, 1s. 6d. for *inquiry*.

The former roll being lost, court ordered a new one to be filed. 2 *Str.* 833.

When action lies
for not entering
judgment.

It concerns the chief clerk that judgment be actually entered up in due time, (provided the roll is docketed and filed,) or he will be liable to an action on the case at the suit of a purchaser.

If the attorney has not done his duty in docketing and filing the roll, he will be liable. 2 *Burr.* 722. *Doyles v. Yallop.*

Judgment is not
docketed, &c.

By *stat.* 4 & 5 *W. & M. c.* 20. *f.* 3. "No judgment, not docketed and entered in the books, shall affect any lands or tenements as to purchasers or mortgagees,"

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"or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestates estates." This only relates to freeholds.

Of registering Judgment.

If the defendant has a freehold estate in *Middlesex* or *York*, you may register the judgment, which will affect them from the day of the registering, (the docket should first be made). May register judgment.

A memorial to be registered pursuant to the statute, &c. Memorial of a judgment.

Of a judgment in his majesty's court of *King's Bench*, of *Trinity* term, in the 36th year of the reign of king *George* the third, between *John Stokes* plaintiff, and *Richard Fenn*, defendant, in a plea of debt for 1000*l.* and 6*3s.* damages. *Roll.* 50.

I do hereby certify, that judgment was signed in the above cause, the 10th day of *June* 1796. Certificate of the master.

Robert Forster.

J. B. clerk to *A. B.* of, &c. gentleman, maketh oath and faith, that he was present and did see *Robert Forster*, esquire, secondary of the court of *King's Bench*, sign the certificate of the judgment in the memorial above mentioned. Affidavit.

Ingross this memorial and certificate on a piece of parchment, with a two shilling stamp thereon, carry it to the master of the *King's Bench* office, and he will, on seeing your *postea*, *inquisition*, or *judgment paper*, subscribe the certificate; swear the affidavit before a master in chancery, or a judge of the court where the judgment was obtained; and when done, file it with the register in *Bell-yard*. Pay the master 1*s.* oath 1*s.* and 5*s.* filing.

N. B. The clerk of the dockets may certify in the absence of the master or his deputy; this must be mentioned in the affidavit. *Vide* title *Executor* as to judgment docketed.

Continuances on the Roll and final Judgment after Trial.

If the cause be not tried the same term issue is delivered, the *venire* must be continued on the roll, by *vicecomes non misit breve*; as, supposing an issue joined Continuances of the venire on the roll.

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Continuance of
the venire by
vicecomes non
misi breve.

in *Easter* term, and the cause not tried till *Trinity*; then, after the award of the first venire, "*the same day is given to the parties aforesaid at the same place,*" add this, "At which day before our said lord the king at *Westminster* came the parties aforesaid, by their attorneys aforesaid; and the sheriff did not return the said writ, nor did he do any thing thereupon; therefore let a jury thereupon come before our lord the king at *Westminster*, on *Friday* next after the morrow of the Holy *Trinity*, by whom, &c. and who neither, &c. to recognize, &c. the same day is given to the parties aforesaid, at the same place." And if it be to *Michaelmas* term, award a new venire over to the first day, "*at which day,*" &c. as above, in the same manner, from term to term; then if the cause is tried, enter on the roll thus:

Continuance of
the process and
judgment there-
on.

^a If at the assizes,
follow the words
of the jurata,
unless the king's
justices, assigned
to hold &c.

If in *Middlesex*,
at *Westminster*-
Hall in the said
county.

^b The said jus-
tices of our lord
the king.

Judgment signed
the 18th day of
June 1796.

Mercy.

Afterwards the process being continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our lord the king at *Westminster*, (*until the return of the distringas,*) unless ^a the king's right trusty and well-beloved *Lloyd* lord *Kenyon*, his majesty's chief justice, assigned to hold pleas before the king himself, shall first come on, &c. (the day mentioned in the *jurata*,) (at the *Guildhall* of the city of *London*,) according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; at which day, before our lord the king at *Westminster*, comes the said *A. B.* by his said attorney; and the said chief justice ^b, before whom the said issue was tried, sent hither his record had in these words, to wit, Afterwards, that is to say (here enter the *poslea* verbatim from the record to the word therefore,) *then say*, It is considered that the said *A. B.* recover against the said *C. D.* his said damages, by the said jury, in form aforesaid assessed; and also 4*l.* for his costs and charges, by the court of our said lord the king, now here, adjudged to the said *A. B.* by his assent, which damages in the whole amount to 100*l.* and that the said *C.* be in mercy, &c.

For the entry of other judgments on the roll, *vide* title *Judgment*.

Executors and Administrators.

ADJUDGED, that when executors sue upon any *contract of their testator*, or for any wrong done to him, they shall pay no costs, either upon a nonsuit or verdict against them. 3 *Salk.* 105. *Bigland v. Robinson.* *Vide*, as to the nonsuit, 1 *Salk.* 207. 3 *Burr.* 1586.

Of executors and administrators.

If an executor or administrator confesses a judgment, and there are not assets sufficient, he is liable to pay the costs *de bonis propriis*; therefore care ought to be taken before such judgment is confessed, that he receive no injury.

If they plead a false plea.

In an action against an executor or administrator, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment of assets *in futuro*; if in debt, a final judgment is signed, if in case, interlocutory, and afterwards a writ of inquiry is executed to complete it; for which judgments, see title Judgment.

When to take judgment of assets in futuro.

If an executor or administrator plead a false plea, that is, such a plea as will be a perpetual bar to the plaintiff, and which, of his own knowledge, he knows to be false, such as *ne unques executor*, or *a release made to himself*, and it is found against him, the judgment will be "*de bonis testatoris, si, &c. si non de bonis propriis*;" for thereby he estrangeth himself from the testator, and the benefit of the will, and, by his own falsity and folly, hath made his own goods chargeable. *Roll. Abr.* 930. *Cro. Jac.* 671. 191. *Moor* 69.

False plea.

If an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say to the contrary on a *devastavit* returned, and so is a jury. *Lutw.* 670. And the sheriff may return a *devastavit* on the first *fi. fa.* if he will. It is at his peril if false, and the inquiry is only for his safety. 1 *Salk.* 30. So in an action on such judgment suggesting a *devastavit*, and he is liable to costs. 6 *Mod.* 308. *Ld. Ray.* 589. 591. *Vide* 1 *Wils.* 258.

If they suffer judgment by default.

So an executor, defendant, shall pay costs in all cases, and the judgment is *de bonis testatoris, si, &c. et si non,*

When they pay costs as defendants.

tunc de bonis propriis: also when he is defendant, and there is judgment for him, he shall have his *costs*. *Cro. Eliz.* 503. *Plow. Com.* 183. *Hutt.* 69.

Upon a writ of inquiry, cannot give in evidence want of assets.

Upon judgment on demurrer sheriff cannot return a *devastavit*.

After two *nihil*s returned, the court will relieve on motion, if defendant comes in a reasonable time.

When judgment shall be *de bonis testatoris*, and when against the executor,

Error costs.

If an executor suffers judgment to go against him by default, upon executing a writ of inquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir, for he should have pleaded *plene administravit*, or specially *what assets* he has. *6 Mod.* 308. So if judgment be given against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict, for he hath charged himself by his own plea. *Cro. Eliz.* 102.

Judgment against the testator, *scire facias* against the administratrix, and two *nihil*s returned, a *scire fieri* inquiry was taken out, and the defendant attended the execution in order to lay the state of the assets before the jury: this was refused. She appeared in *Hil. 8 Geo. 2.* to the *sci. fa.* inquiry, pleaded *plene administravit*, and traversed the *devastavit*. On notice of trial and countermand, she in *M. 10 Geo. 2.* moved to have the award of execution set aside, and to be admitted to plead, it being to no purpose to expect relief on the trial of the traverse. *Salk.* 93. 264. was cited, to shew the court will relieve on motion where no *sci. fa.* had issued, and the state of the real assets was proved to be 130l. which he offered to deliver up. *Cur.* thought that she came too late, and refused to interpose for that reason only. *Wharton v. Richardson, Str.* 1075.

If an action of debt on an obligation be brought against an executor, who pleads *plene administravit*, and the plaintiff replies assets, which are found by the jury to be 172l. that a judgment to recover the entire debt and damages, and costs of the goods of the testator, *fi, &c. et si non, tunc*, the damages of his proper goods, is good; for that the defendant's bar being in effect, that he had not assets, the same amounted to a confession of the debt, on which the plaintiff may take judgment immediately, though he cannot have execution, until assets come to the hands of the executors. *8 Co.* 134. *Hob.* 199. *Lev.* 286.

If an executor brings error of judgment after a *devastavit*, he shall pay costs. *Str.* 977.

An

An executor is liable to pay costs on a *non pros*, for not declaring, but not upon a discontinuance. 3 Burr.

Liabie on non pros for not declaring.

1584. *Hawes ex. v. Saunders*

But not in all cases of discontinuance without paying costs. For if it is plainly his own fault, he shall not have such leave; so in the case of not going on to trial, if it is his own laches, he shall pay costs. 1 Salk.

Liabie to costs not going to trial.

314. 4 Burr. 1929. *Bennet v. Coker*.

On an action brought by an administrator against an heir, plaintiff did not try according to his notice, the defendant moved for judgment, as in the case of a nonsuit, whereupon the plaintiff undertook to try peremptorily; when the cause came to trial, the plaintiff discovered that the estate had been conveyed, and was then satisfied that the deed would be produced against him; whereupon he declined going to trial: and now desired to discontinue without costs. The court granted the motion, but he was not to bring any new action, without leave of the court. 4 Burr. 1927. *Bennet adm. v. Coker*.

After motion for judgment, as in the case of a nonsuit, the administrator had leave to discontinue, though he undertook peremptorily to try.

A promise by an administrator to pay the debts of intestate, if there be no assets, is *nudum pactum*; and the submission to arbitration by an administrator is not of itself an admission of assets. *Pearson v. Henry adm.* 5 Term Rep. 6. *Barry v. Rush*, 1 Term Rep. 691.

When promise by administrator is made.

Debt on a judgment against testator not docketed, is on a level with *simple contract* debts. And on a plea of *plene administravit* to debt on a judgment against the intestate not docketed, the defendant may give in evidence, payment of a bond and other specialty debts, which exhausted all the assets. *Hickey v. Hayter ad.* 6 Term Rep. 384. 4 & 5 W. & M. c. 20. To make administratrix liable in this case as for a *devastavit*, the judgment should have been docketed; notice of it would not have done. *Ibid*.

If a judgment be not docketed.

In payment of debts, the executor must observe the rules of priority, otherwise, on a deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. First, He may pay all funeral charges, and the expence of proving the will, and the like. Secondly, Debts due to the king, on record or specialty. 1 Andr. 129. Thirdly, Such debts as are, by particular statutes, to be preferred to all others; as the forfeitures for not burying in woollen, stat. 9 Ann. c. 10. Money due on poor's rates.

Rules to be observed by executors as to payment of debts.

30 Car. 2. c. 3. Fourthly, Debts of record, as judgments (docketed according to the 4 & 5 W. & M. c. 20.), statutes and recognizances, 4 Rep. 60. Cra. Car. 363. Fifthly, Debts due on special contracts; as for rent, or upon bonds, covenants, and the like, under seal. Wentw. c. 12. Lastly, Debts on simple contracts, viz. notes and verbal promises; among these simple contracts, servants wages are by some with reason preferred to any other. 1 Roll. Abr. 927.

When he may retain.

Among debts of an equal nature, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to, 10 Mod. 496. and he may give it in evidence. 3 Burr. 1383. Wherever an executor or administrator may be sued, or might have paid, he may retain. Ibid. 1384. Covenant is as much a lien upon the assets, as an action of debt. Ibid.

Old method of obtaining judgment de bonis propriis.

The old way to obtain judgment against an executor or administrator, *de bonis propriis*, was to get a *fi. facias* returned by the sheriff, "that the testator had no goods," then to issue a *scire fieri* inquiry, reciting the *fi. fa.* and suggesting that they were wasted, and commanding the sheriff to inquire whether the defendant had wasted any of the deceased's effects or not; and upon the sheriff's return of a *devastavit*, a *scire facias* issued against the defendant, "to shew cause why the plaintiff should not have judgment *de bonis propriis*," to which the defendant might appear and plead *plene administravit*: but lately the mode has been either to bring an action suggesting a *devastavit*, or issue a *scire facias* in which is contained a *fi. fa.* which was devised as the speedier way to obtain execution on the judgment. *Ld. Ray.* 1382. Vide *Str.* 623.

The best way.

But this is said not to be a good way to proceed where the debt is small, as no costs are allowed to the plaintiff; unless the defendant pleads to the *scire facias*: therefore the best way is, to bring an action suggesting a *devastavit*, and before brought, it is necessary that a *fi. fa.* be returned by the sheriff *nulla bona*, as to the goods of the testator.

For judgments against executors, vide title Judgments.

*Postea.**Postea for Plaintiff on Non assumpsit.*

AFTERWARDS (that is to say) on the day and at the place within mentioned, before the *Right Honourable Lloyd lord Kenyon*, the chief justice within written, *Roger Kenyon, Esq.* being associated unto the said chief justice, by force of the statute in that case made and provided, the within named *C. D.* came by his attorney within contained, and the within named *E. F.* although solemnly required, came not, but made default, therefore let the jurors of that jury within mentioned be taken against him by his default: and the jurors of that jury being summoned, came, who, to say the truth of the within contents, being chosen, tried and sworn, say, upon their oath, that the within named *E. F.* did undertake and promise, in manner and form as the within named *C. D.* hath within complained against him; and they assess the damages of the said *C. D.* by occasion of the not performing the within mentioned promises and undertakings, over and above his costs and charges, by him about his suit, in this behalf expended, to 112*l.* and for those costs and charges to 40*s.*

To be ingrossed on the back of the record with a double half-crown stamp, and marked by the clerk of the common bails, "delivered of record," pay him 6*s.* then go to the master to tax the costs, pay in case and debt 4*s.* in trespass 6*s.* 8*d.* more for the fine.

Afterwards (that is to say) on the day and at the place within mentioned, before the *Right Honourable Lloyd lord Kenyon*, the chief justice within written, *Roger Kenyon, Esq.* being associated unto him, according to the form of the statute in that case made and provided, came the within named *A. B.* by his attorney within contained, and the within named *C. D.* although solemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of against him by his default; and the jurors of that jury being summoned, some of them (that is to say) [*here name only the jurors that appeared on the panel*]; and because the residue of the jurors of the same jury do not appear, therefore other persons of those standing by the court, by the sheriff of the county aforesaid, at the request of the said *A.* and by the command of the said chief justice (if in *London* or *Middlesex*; if at the assizes, then by the command of the

With a tales.

said justices), are now newly set down, whose names are affixed in the within-written panel, according to the form of the statute in that case made and provided; which said jurors, so newly set down, (that is to say) *K. L. of, &c. haberdasher (naming the rest of the talef-men)*, being required, came, who, together with the said other jurors before impanelled, and sworn to declare the truth of the within contents, being elected, tried, and sworn, upon their oath, say, that the said *C. D.* did undertake and promise in such manner and form as the said *A.* hath within complained against him; and they assess the damages of the said *A. B.* by reason of the not performing the promises and undertakings within written, besides his expences and costs laid out by him in this behalf, to 12l. and for those costs and charges to 40s.; therefore, &c.

For plaintiff on
non est factum.

Say, upon their oath, that the within mentioned writing obligatory, is the deed of the within named *E. F.* as the within written *C. D.* hath within declared against him, and they assess the damages of the within named *C. D.* by occasion of the detaining the within debt, over and above his costs and charges by him about his suit expended, to 1s. and for those costs and charges to 40s.; therefore, &c.

Do. on nil debet.

Say, upon their oath, that the within named *C. D.* doth owe to the within named *A. B.* the said 20l. within mentioned, in manner and form as the said *A. B.* hath within complained against him, and they assess the damages, &c. *ut supra.*

Do. in trespass.

Say, upon their oath, that the within named *C. D.* is guilty of the premises within laid to his charge in manner and form as the said *A. B.* within complains against him, and they assess the damages of the said *A. B.* by occasion thereof, over and above his costs and charges, &c. as before.

For plaintiff on
a plea of plene
administavit.

Say, upon their oath, that the said *A.* (the defendant) hath, and on the day of exhibiting the bill of the said *C.* within written, had divers goods and chattels, which were of the said *J. H.* within mentioned at the time of his death in her hands to be administered, to the value of the debt within specified, whereof she might have made satisfaction to the said *C.* for his said debt, as the within named *C.* in his said replication hath alledged, and they assess the damages of the said *C.* by occasion thereof, besides his expences and costs by

by him about his suit in this behalf expended, to 40l. and for those costs and charges to 40s.; therefore, &c.

Say, upon their oath, that the said *C.* is guilty of the trespass and ejectment within written, in manner and form as the said *B.* hath within complained against him; and they assess the damages of the said *B.* by occasion thereof, over and above his expences and costs, laid out by him about his suit in this behalf, to 1s. and for those expences and costs to 40s.; therefore, &c.

For plaintiff in ejectment.

Say, upon their oath, that the said *C. D.* did within six years next before the day of exhibiting the bill of the said *A. B.* undertake and promise in manner and form as the said *A. B.* hath within by replying alledged, and they assess, &c.

For plaintiff on non assumpsit infra sex annos.

Say, upon their oath, that the said *C. D.* and *E. F.* are not guilty of the trespass in the declaration within specified, as the said *C.* and *E.* have within complained against them, and they assess, &c.

Do. on not guilty in trespass.

Say, upon their oath, that the within named *John*, at the time of exhibiting the bill of the said *James* within mentioned, did fully administer all and singular the goods and chattels which were of the said *T.* at the time of his death, in his hands to be administered; and that he the said *John* had not, nor on the day of exhibiting the within bill or at any time afterwards had, any goods or chattels which were of the said *T.* at the time of his death, in his hands to be administered, wherewith he was able to pay the debt within specified, or any part thereof, to the said *James*, as he the said *John* hath within in pleading alledged; therefore, &c.

For defendant on a plea of plene administravit.

Say, upon their oath, that the within written *C. D.* the testator, did in his life-time undertake and promise in manner and form as the said *A. B.* hath within declared against him; therefore, &c.

On non assumpsit by an executor.

Say, upon their oath, that the within written *C. D.* in his lifetime, and before the day of his exhibiting the within written bill, did not pay or cause to be paid to the within named *A. B.* the within mentioned sum of 100l. and all interest due for the same, as the said *L.* hath within in pleading alledged, and they assess the damages of the said *A.* by reason thereof, besides his expences and costs laid out by him about his suit in this behalf, to 1s. and for those expences and costs to 40s.; therefore, &c.

For plaintiff on an issue of solvit ad diem.

Say,

For defendant on
non assumpsit.

For plaintiff in
assault on two
pleas.

Say, that the said *C. D.* within named, did not undertake and promise in manner and form as the said *C. D.* hath within in pleading alledged; therefore, &c.

Being elected, impanelled, and sworn to declare the truth of the within contents, as to the first *issue* joined, between the said *John* and the said *James*, declare upon their oath, that the said *James* is guilty of the premises within charged upon him, as the said *John* hath within alledged; and as to the other *issue* joined between the said *John* and the said *James*, the said jurors upon their said oath further say, that the said *James* of his own wrong, and without any such cause, as the said *John* within in pleading hath alledged, made an assault upon the said *John* and then and there did beat, bruise, wound, and ill-treat the said *John* in manner and form as the said *John* hath within in his said replication in that behalf alledged, and they assess the damages of the said *John* by reason thereof, besides his costs and charges by him laid out, about his suit in this behalf, to 5*l.* and for those costs and charges to 40*s.*; therefore, &c.

On a nonsuit.

And the jurors of that jury, being summoned, came; who, to say the truth of the within contents, were chosen, tried, and sworn; and after evidence being given to them of and upon the within contents, went from the bar of this court, to discourse of their verdict of and upon the premises; and after the said jury had discoursed and agreed among themselves, they came back to the said bar to give their verdict in this behalf; upon which the said *A. B.* (the plaintiff) being solemnly required, came not; nor did he further prosecute his said bill against the said *C. D.*; therefore, &c.

Postea in debt
upon five issues,
there being a
demurrer to the
replication to the
fifth plea.

Afterwards, that is to say, on the day, and at the place within mentioned, before Sir *Nash Grose* Knight, one of the justices assigned to hold pleas in our court before us, *Roger Kenyon*, Esquire, being associated unto the said justice by force of the statute in such case made and provided, the within named *J. H.* came by his attorney within contained, and the within named *W. P.* although solemnly required, came not but made default, therefore let the jurors of that jury within mentioned be taken against him by his default; and the jurors of that jury being summoned came, who,

who, to say the truth of the within contents, being chosen, tried, and sworn, say, upon their oath, That the within mentioned writing obligatory is the deed of the within named *W. P.* And the jurors aforesaid, upon their oath aforesaid, further say, That the said *W. P.* did not at any time before the day of the exhibiting of the bill of the said *J.* pay to the within named *J.* the whole principal money due by the said condition of the said writing obligatory, or any part thereof, in manner and form as the within named *J.* hath in his replication secondly within alledged: And the jurors aforesaid, upon their oath aforesaid, further say, That the within named *W.* did not pay to the said *J.* the within mentioned sum of 800*l.* or any part thereof, on the said first day of *February*, in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition, in manner and form as the within named *W.* hath in his said plea within alledged: and the jurors aforesaid, upon their oath aforesaid, further say, That at the time of the exhibiting the bill of the said *J.* against the within named *W.* there was and still is the sum of 800*l.* due and payable by the within named *W.* to the said *J.* on the said writing obligatory in the within declaration mentioned, by virtue of the condition of the said writing obligatory, in manner and form as the within mentioned *J.* hath in his replication to the plea of the said *W.* fourthly alledged: And the jurors aforesaid, upon their oath aforesaid, further say, That the within named *J.* was not, nor is indebted to the within named *W.* in manner and form as the said *W.* hath in his fifth plea within alledged; and they assess the damages of the said *J.* by occasion of the detaining the within debt, over and above his costs and charges by him about his suit expended, to 1*s.* and for those costs and charges to 40*s.*; therefore, &c.

Executions.

AN execution is a judicial writ, grounded on the judgment of the court from whence it issues; and is supposed to be granted by the court, at the request of the party at whose suit it is, to give him satisfaction on

For the sheriff's duty on a ca. sa. ad satisf. Vide my Office of Sheriff, p. 141.

the judgment which he hath obtained: and therefore an execution cannot be sued out in one court upon a judgment obtained in another.

There are but *three* sorts of execution commonly in use at this time for the obtaining satisfaction for a debt, damages, or costs given by the judgment, *viz.* a *capias ad satisfaciendum* against the body of the defendant only; and whenever the body is taken by this writ, the plaintiff can have no other execution against his goods and chattels, lands or tenements; for as *corpus humanum non recipit aestimationem*, so it is deemed the greatest and highest satisfaction one man can have of another. And hence if a man died in custody before the 24 *Jac.* 1. c. 24. on this writ, the debt was presumed to be satisfied; but by this statute he may have other execution against his lands or goods at his election. A *feri facias* against the goods and chattels of the defendant only, and an *elegit* against the goods and chattels (except oxen and beasts of the plough), and also one half of the defendant's lands, to hold by the plaintiff until the debt, or damages and costs, are satisfied.

After judgment signed, may bring an action or have execution.

After final judgment is signed, the plaintiff may immediately, and *before it is entered on the roll*, either bring an action of debt on the judgment, or he may *within* a year after the judgment signed, (to be computed *from the time of signing the judgment*,) take out execution against the body, lands, or goods of defendant; but where he brings debt on the judgment, he cannot then take out execution, unless he discontinues the action.

The common writ of *capias ad satisfaciendum* and *feri facias*, are to be had at the stationers', printed in blank, and stampd with a 3s. 6d. stamp on parchment, which is to be sealed only, pay 7d.

If levied in debt.

If the judgment be in debt on bond, direct the execution to be levied for the debt as well as *sheriff's poundage and fees*, which is to be taken out of the penalty.

If in case.

If it be levied upon a judgment in case, then levy the damages recovered with the costs; in this case, the costs are added to the damages recovered, and *called damages in the writ*.

Cannot be two executions at one time.

There ought *not* to be *two* executions existing at the *same* time, but you may have a *fi. fa.* first, and if the sheriff

sheriff does not levy to the amount of the debt, or damages recovered, you may have a *ca. fa.* for the residue; in such case, the sheriff *should return the fi. fa. and the levy thereon first*, which ought to be recited in the *ca. fa.* *Salk. 218. Cro. Eliz. 344.*; but if he does nothing on the *fi. fa.* then there is no necessity to recite the sheriff's return in the *ca. fa.* or of its having been issued.

An *elegit* may be had after a *fi. fa.*; but if once the body is taken, there cannot be a *fi. fa.* or *elegit*; for the body is deemed the highest satisfaction.

An *elegit* may be had after *fi. fa.*

These executions must be sued out within a year and a day after the judgment signed; and the time is to be accounted from the day of signing judgment, otherwise there must be a *scire facias*, unless delayed by bills in chancery, 1 *Burr. 660.*; or if occasioned by error. 1 *Str. 301.*

To be sued out within a year and a day.

But if it be taken out and returned by the sheriff within the year, there needs no *scire facias* before you sue out another; and it is proper to award the first on the roll, with the sheriff's return thereon. *Str. 100. Aires v. Hardress. N. on R. E. 5 Geo. 2.*

When no *sci. fa.*

Actions were brought upon a promissory note against the drawer and indorser, and judgments in both. Defendant having tendered the principal in one, and the costs in both, court ordered that no execution should be taken out. *Str. 515. Idem v. Trull.*

When a contempt.

If you first sue out a *fieri facias* against the defendant's goods, and levy part thereof, you may afterwards have a *ca. fa.* against his body for the residue; or a second *fi. fa.* or an *elegit* for the residue of the debt and damages.

After *fi. fa.* may have *ca. fa.*

The *ca. fa.* may be sued out after an *elegit* executed only on goods, and a *nihil* returned as to the lands; for there being a *nihil* returned as to the lands, the *elegit* was but in the nature of a common *fieri facias*. The election is not complete unless the plaintiff has some benefit from the land. *Bacon v. Peck, Str. 226.*

May be sued where no benefit from *elegit*.

Ca. fa. in debt.

George the third, by the grace of God of Great Britain, France, and Ireland, king,

The like in case.

George the third, by the grace of God of Great Britain, France, and Ireland,

To be sued out in the county where the venue is laid,

king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take *C. D.* if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to satisfy *A. B.* 2,100*l.* which the said *A. B.* lately in our court before us at *Westminster* recovered against him: as also 63*s.* which in our said court before us were adjudged to the said *A.* for his damages which he had sustained as well by occasion of the detaining that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record; and have you there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 9th day of *May* in the 36th year of our reign.

J. Nixon.

Levy 653*l.* 3*s.* besides sheriff's poundage, and all other incidental expences.

land, king, defender of the faith, &c. To the sheriffs of *London*, greeting: We command you, that you take *Richard Fenn*, if he be found in your bailiwick; and him safely keep, so that you have his body before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to satisfy *John Denn* 500*l.* which were adjudged to the said *John* in our said court before us at *Westminster* for his damages which he had sustained, as well by reason of the non-performance of certain promises and undertakings made by the said *Richard* to the said *John*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard* is convicted, as appears to us of record; and have there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 9th day of *May*, in the 36th year of our reign.

J. Nixon.

Levy the whole.

^a All writs of execution should be tested in term time, 2 *Salk.* 700. and as the judgment relates to the first day of the term wherein it is signed, if issued in the term, it may be tested on the first day (in full term), or any day in the term; if proceedings be by bill, its made returnable on a day certain, if by original on a general return day, wherever, &c. The teste as well as the return may be amended. *Say. 12.* If issued out of term, it is tested the last day of the term preceding.

In covenant.

For his damages, which he had sustained as well by reason of a certain breach of covenant made between the said *John* and *Richard*, as for his costs and charges by him expended in and about his suit in that behalf, whereof the said *Richard* is convicted, as appears to us of record.

Trespass and assault.

For his damages, which he had sustained as well by occasion of a certain trespass and assault, made on the said *John* by the said *Richard*, as for his costs and charges, &c.

Trespass.

For his damages, which he had sustained, as well by occasion of a certain trespass done to the said *John* by the said *Richard*, at *L.* in your county, as for his costs, &c.

In ejectment for damages.

For his damages, which he had sustained as well by occasion of a certain trespass and ejectment of farm, done to the said *John* by the said *Richard* at *L.* in your county, as for his costs and charges by him expended in and about his suit in that behalf, whereof, &c.

Replevin.

For his damages, which he had sustained as well by occasion of the taking and unjustly detaining the cattle of the said *John*, at *W.* in a certain place called the *H.* in your county, &c. as for his costs, &c.

For words.

For his damages, which he had sustained, as well by occasion of the speaking and publishing certain false and scandalous words by the said *Richard* of the said *John*, as for his costs and charges, &c.

On a judgment in this court, execution may be awarded into *Wales*, or a *county palatine*. *Cro. Jac.* 484. *Cro. El.* 445. 1 *Lev.* 291. *Ray.* 206. 1 *Lev.* 256.

Execution may go into *Wales*, &c.

For the defendant.

To satisfy *Richard Fenn* 14l. 10s. which were adjudged

On a nonsuit.

To satisfy *Richard Fenn* 12l. 10s. which were adjudged

^a The statutes relating to poundage are 29 *El.* c. 4. *Salk.* 332. 3 *Geo.* 1. c. 15. s. 17. If he levies he is entitled though the parties compromise. 5 *Term Rep.* 470. If plaintiff chooses an auction he must defray the expence out of his own debt. 2 *Term Rep.* 157. Vide my *Office of Sheriff*, 171.

judged to the said *Richard* in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges by him laid out about his defence, in a certain plea of trespass on the case, prosecuted in our said court before us, by the said *John* against the said *Richard*; and have you there then this writ. Witnesses, &c.

In a penal action.

To satisfy us and *John Denn*, who sues as well for us as himself in this behalf, 450*l.* debt, which the said *John*, who sues as aforesaid, in our court, before us, recovered against the said *Richard*, (that is to say) one moiety thereof, to wit, 225*l.* to the said *John*, who sues as aforesaid, to his own proper use, and the other moiety thereof, to our own proper use, according to the form of the statute in such case made and provided; whereof the said *Richard* is convicted, as appears to us of record; and have there then, &c.

Execution omitting a term in its *teste*, is not void, the cause being at an end. *Salk.* 700. *Ld. Ray.* 775.

All writs of execution may be amended by the award on the roll, which, previous to application, get properly awarded thereon.

A writ of *ca. sa.* was amended after defendant taken, by altering the sum in the writ, and striking out part

judged to the said *Richard* in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges which he sustained by reason of the false claim of the said *John*, in a certain plea of trespass on the case, prosecuted in our said court before us, by the said *John* against the said *Richard*; and have, &c.

For an administrator.

To satisfy *John Denn*, administrator of all and singular the goods and chattels, rights and credits, which were of *James Wren*, deceased, who died intestate, for 1000*l.* debt; and also 16*l.* 10*s.* for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his expences and costs, laid out by him about his suit in that behalf, whereof the said *Richard* is convicted, as appears to us of record; and have there then, &c.

to which he was not liable. 2 Term Rep. 737. *Larouche v. Walsbrough*.

The sheriff may take all the defendants in execution. 5 Rep. 86. 11 Rep. *Godfrey's case*.

If the execution be taken out after judgment on a *sci. fa.* by default, then, after the words, "*whereof he is convicted, as appears to us of record,*" say, "And whereof in our same court, before us, it is considered, That the said *John* have his execution against the said *Richard* for the debt and damages afore said, by the default of the said *Richard*, as likewise appears to us of record; and have you there then this writ. Witness, &c."

If after *sci. fa.*

If the defendant is not to be found in the county where the *venue* is laid, you must then sue out a *testatum*, which is generally done in the first instance, (but the *ca. fa.* must issue to warrant the *testatum*; they may be sealed together, pay 1s. 2d.) 3 Term Rep. 388. the form of which is as follows:

Testatum.

George, &c. (to the end of the first writ). As appears to us of record, and our said sheriff of *Middlesex*, at a certain day now past, returned to us at *Westminster*, That the said *Richard* was not found in his bailiwick; whereas it is testified in our said court before us, That the said *Richard* lurks and wanders up and down in your county; and have there then this writ. Witness, &c. (pay sealing both writs 1s. 2d.)

Testatum *ca. fa.*

N. B. By original say, "and have you there this writ;" leave out the word *then*.

A *capias ad satisfaciendum* lies not against peers of the realm, or their wives, or peers of Scotland (except upon a statute merchant, pursuant to stat. of *Edon Burnell*, 11 Ed. 1. or statute staple, according to 27 Ed. 3. or on a recognizance in nature of a statute staple, upon 23 H. 8. c. 6.) Nor against members of parliament, executors or administrators, for the debt of the testator or intestate.

Will not lie against peers.

Rule why defendant should not be discharged, and why the *testatum ca. fa.* should not be set aside, there being no original *ca. fa.* to warrant it. The court said, the plaintiff might cure the objection even after error brought, but were inclined to think, that as the original *ca. fa.* was not returned by the sheriff, or entered on the roll, that was a fatal objection.—It was then suggested, that the roll was not in court, but that if an-

Court will not set aside a test. *ca. fa.* sued out without an original *ca. fa.* though a writ of error has been brought, if *ca. fa.* has been afterwards sued out, returned and entered on the roll.

E e

other

other day were given to plaintiff to bring in the roll, the original would appear properly there; accordingly the matter stood over till this day, when the writ appearing properly entered on the roll, the rule was discharged. *Milstead v. Coppard*, 5 Term Rep. 272.

Though a testatum be sued out without a *ca. sa.* yet court will not on seeing the entry on record, and sheriff's return of the original *ca. sa.* set it aside, but will order an amendment of the testatum conformable to the judgment without costs, and order *ca. sa.* to issue.

Rule why *testatum ca. sa.* should not be set aside, because no original *ca. sa.* to warrant it, and because the *testatum* was not warranted by the judgment, which was for *trespass, assault, and for crim. con.* with plaintiff's wife, whereas the execution was for *trespass and assault on plaintiff*. Pending rule, plaintiff applied for another rule to amend the *testatum ca. sa.* by making it conformable to the judgment, and to sue out and seal an original *ca. sa.* in London, to warrant the *testatum*; both motions came on together. Court, on seeing the record produced in court, said, that the foundation of the application failed, for that it then appeared to them that the proceedings were regular, the record (meaning the roll) being produced in court with the *ca. sa.* entered, and sheriff's return. They discharged the first rule, and thought it reasonable the second rule should be made absolute *without costs*. *Shaw v. Maxwell*, 6 Term Rep. 451. Vide 3 Term Rep. 657. *Cowperthwaite v. Owen*, S. P.

Fieri Facias.

Vide my Office of Sheriff, 147. for sheriff's duty.

This writ was the only writ of execution that lay at common law, and was afterwards confirmed by the statute of *West. 2.* It lies as well against privileged persons, peers, members, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased, as for costs awarded against them by false pleading or confession of judgments, if no goods of the testator are to be levied for those costs.

If part levied.

If part only of the debt be levied on this writ, the plaintiff may have a *ca. sa.* for the residue, but he should recite the sheriff's return. 1 Roll. Abr. 904. *Cro. Eliz.* 344.

Ingrossed.

To be ingrossed on a 3s. 6d. stamp parchment, and sealed; and is to issue only in the county where the *venue* is laid. The stationers have them ready printed. If it be into another county, it is called a *testatum*.

There

There need not be *fifteen* days between the *teste* and return of any *ca. fa.* or *fi. fa.* (except against bail or in outlawry). Stat. 13. Car. 2. c. 2. s. 7, 8.

If it be sued out in *term* time, *teste* the writ the *first* day of the *term* (although the judgment is not signed till *four* days after); if out of *term*, *teste* it the *last* day of the *term*.

If sued out in term, or vacation.

Rule why *test. fi. fa.* should not be set aside, and the goods restored, plaintiff not having issued a *fi. fa.* to warrant it; the court said, according to the established practice, the want of an original *fi. fa.* was a *decisive* objection, though the irregularity might be cured by a subsequent production of that writ. Rule absolute.

A *fi. fa.* must be sued out to ground a *testatum*.

Brand v. Mears, 3 Term Rep. 388.

N. B. The court will not look at the date of the seal, if it is produced; therefore, before this motion comes on, if sued out, it will do, so as it be produced at the time of shewing cause under seal.

By stat. 29 Car. 2. the goods are bound only from the time of the delivery of the writ to the sheriff; but lands are bound from the day of the judgment.

When goods are bound from.

If all the money is not levied, the writ must be returned before a *second* execution can be made out, because the second is grounded on the deficiency of the first, *Salk.* 318.; and the sheriff's return to the first writ must be recited. *Ibid.*

If all the money is not levied.

A *fieri facias* being executed fraudulently, a *fi. fa.* at the suit of another afterwards, shall stand good, and is to be preferred. 1 *Wils.* 44.

The defendant had been declared a bankrupt, the certificate had been signed by four parts in five in number and value of the creditors, but not allowed at the time a writ of *fieri facias* issued. Motion to set it aside. The debt was previous to the bankruptcy; court discharged the rule. *Callen v. Meyrick*, 1 Term Rep. 362.

Bankrupt.

Where two writs of *fieri facias* are delivered to a sheriff on different days, and no sale actually made, the *first* execution must have a priority, even though the seizure was first made under the subsequent execution. *Hutchinson v. Johnson*, 1 Term Rep. 729. The goods of the party are bound by the delivery of the writ. Per *Ashurst* Justice. And if the person claiming under the second execution pay the sheriff the amount of the debt under the first, and takes a bill of

Where two writs delivered.

sale, the court will not compel the sheriff to refund that money on motion. *Ibid.*

Sheriff who began the execution shall end it.

The sheriff that began the execution shall end it, though he is out of office, *Salk.* 323.; and may sell goods after he is out of his office, without a *venditioni exponas*. *Lord Raym.* 990.

If sheriff returns the want of buyers, how to proceed.

If the sheriff return, That he has levied the goods, and that they remain in his hands for want of buyers, and he continues in office, a *venditioni exponas* issues to make sale thereof, by which he is compelled thereto. If he be out of office before he makes sale, then sue out a *distringas* to compel him to sell the goods, directed to the new sheriff, to distrain the old sheriff to sell; whereby he is compellable so to do; or move for issues against him to the value of the goods. 6 *Mod.* 295, 296.

If against one partner.

On a *fi. fa.* upon a judgment against one partner, the sheriff may take the goods of both, and the vendee shall have a moiety in common with the other. *Comb.* 217.

If defendant dies in execution.

If a man died in execution, formerly his executors were no farther chargeable; but now, by *stat.* 21 *Jac.* 1. c. 24. "though he do die in execution, yet the plaintiff may have an execution against his lands, goods, and chattels."

No abatement by plaintiff's death.

Execution does not abate by the plaintiff's death; but the sheriff must go on to execute his writ. *Mod. Ca. L. & Eq.* 225. *Salk.* 322. 6 *Mod.* 290.

Landlord.

A landlord is entitled to a year's rent in the case of an execution, without deduction, and the sheriff must take care of him, 8 *Ann.* c. 14. s. 1.; but a ground landlord cannot come in for a year's rent on an execution against an under lessee; for the statute only extends to the immediate landlord, *Str.* 787.; the landlord must give the sheriff notice, or he is not bound. 1 *Str.* 97. Vide 2 *Wils.* 140. And is entitled without poundage. *Str.* 643.

If after verdict, and before day in bank.

If a plaintiff dies after a verdict, and before the day in bank, though the judgment be right, yet a *sci. fa.* must be awarded before execution. 1 *Wils.* 302. *Earl v. Brown.*

When may be sued without *seise facias*.

If a *fi. fa.*, *ca. fa.*, or *elegit*, be take out within the year, and returned and awarded on the roll, the same may be continued from term to term, to the time of the execution thereof, although after the year, and be

as effectual as if the judgment had been revived by *scire facias*. *N. on R. E. 5 Geo. 2.* But a *fi. fa.* must be left with the proper officer, before he will make the entry on the roll, returned by the sheriff.

If the king's extent be sued out *posterior* to a judgment recovered by the subject, and a writ of execution thereon be delivered by the sheriff, though not executed, the king shall not be preferred. *Uppom v. Sumner, 2 Black. Rep. 1251. 1294.* Vide *Com. Dig. 2 V. 538.* 3 *Mod. 236.* *Lechmere v. Thornygood*; held, that *after* execution at the suit of the subject begun, but not completed, the king's extent came too late.

Vide 33 H. 8.
c. 39. s. 74.
Hard. 23. Comb.
123. 7 Rep. 18.
when the king to
be preferred, and
when not.

If goods be taken on a *fi. fa.* against the king's debtor, and before sale an extent comes at the suit of the king, grounded on a bond debt, tested *after* the delivery of the *fi. fa.* to the sheriff, the goods cannot be taken on the extent. *Rorke v. Dayrell, 4 Term Rep. 402.* Prerogatives are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public; they are not to be extended *farther* than the laws and constitution of the country have allowed them; but, within those bounds, they are entitled to every protection. I have always understood it to be clear and settled, that *if an extent* at the suit of the crown be tested *prior* to the time when the *subject's execution* is delivered to the sheriff, the *former* shall have the preference: But as by the common law abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach. In this case the sheriff had *actually seized* the goods under the plaintiff's execution, and an execution *once begun* shall proceed; it shall not stop on the issuing of a commission against the debtor; and in this respect I know no distinction between the case of the crown, and that of the subject. *Lord Kenyon.*

If goods taken
on *fi. fa.* and ~~the~~
fore sale, extent
comes in.

Although a judgment be obtained by the subject first, and he lays by, and does *not execute his writ*, Mr. J. Buller says, he is inclined to think the execution by the subject would be postponed. The C. B. in *Hardres* says, *the execution of the subject must be executed.*

The words of the stat. 33 H. 8. are, "that the king's suit shall be preferred to that of any other person, so always that the king's suit be taken or commenced, or process awarded, before judgment given for the said other person or persons." This act gives a new prerogative to the king in various instances, four of which Lord Coke names in his 7 Rep. 18. b.

If defendant die in Easter term, a judgment entered in the vacation is good, but an execution sued out and tested after his death, will be set aside.

The teste of the *fi. fa.*

Execution.

If the execution (it is said) be tested in the defendant's lifetime, it may be taken out and executed after his death. 12 Mod. 5. 2 Ld. Ray. 850. 7 Mod. 95. Gilb. Exec. 15, 16. Gilb. Law of Executions, 46. Cro. Eliz. 181. 1 Mod. 188. Comb. 33. Pract. Reg. 215. Tidd. 728. But in December 1794, defendant gave to B. a warrant of attorney to confess judgment for 1592l. on which judgment was immediately entered up, but no execution sued out. The defendant died in Easter term, 5th May. The 19th, in the vacation between Easter and Trinity terms, the plaintiff (Heapy) signed judgment on a warrant of attorney given by Parris in his lifetime, upon which execution was taken out. The latter judgment was not docketed until the 9th of June. Rule to set aside judgment, and why the goods under *fi. fa.* should not be restored. Cases cited against rule, 2 Lord Ray. 766. 849. 3 P. Wms. 398. In support of it, the stat. 4 & 5 W. & M. c. 20. s. 3. And it was said the writ was tested on the last day of the term, before which time, defendant was dead. 2 Vent. 218. Lord Kenyon, In general when a judgment is entered up in the vacation on a warrant of attorney, and the defendant was alive within the preceding term, it is a valid judgment, though the defendant be not alive on the day when the judgment is actually entered up, because it relates to the first day of the antecedent term. Therefore it seems there is no objection to this judgment. But the execution is irregular, and great injustice may be done to creditors if we permit the execution to stand. The plaintiff should have sued out a *scire facias* to revive against defendant's executor. The moment a party is dead, the rights of the creditors are fixed. A judgment debt is a debt of a superior nature, and when docketed is to be paid before simple contract debts. But the defendant's executor could have no notice of this judgment, when the execution was sued out, and may perhaps be paying other debts of an inferior nature. The judgment should have been revived.

First

First part of rule as to the judgment was discharged, the latter respecting the execution made absolute. *Heapy v. Parris*, 6 Term Rep. 368.

An execution tested out of term is not void, 2 Burr. 1188.; it may be amended. If tested out of term.

Fi. fa. in Case.

George the third, &c.
To the sheriff of Gloucestershire, greeting: We command you, That you cause to be levied of the goods and chattels in your bailiwick of C. D. 50l. which A. B. lately in our court, before us at Westminster, recovered against him, for his damages, which he had sustained as well by means of the not performing certain promises and undertakings made by the said C. D. to the said A. B. as for his costs and charges by him expended about his suit in that behalf, whereof the said C. is convicted, as appears to us of record; and have you that money before us at Westminster, on Friday next after the morrow of the Holy Trinity, to render to the said A. B. for his damages aforesaid; and have there then this writ. Witness Lloyd lord Kenyon at Westminster, the 27th day of May, in the 36th year of our reign.

Mansfield and Way.

Fi. fa. in Debt.

George the third, &c.
To the sheriff of Middlesex, greeting: We command you, That you cause to be levied of the goods and chattels in your bailiwick of C. D. as well a certain debt of 60l. which A. B. lately in our court, before us at Westminster, recovered against him, as also 63s. which in our same court before us were awarded to the said A. B. for his damages which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record; and have you that money before us at Westminster, on Friday next after the morrow of the Holy Trinity, to render to the said A. for his debt and damages aforesaid; and have there then this writ. Witness, &c.

To be issued in the county where venue is laid, otherwise a testatum 3s. 6d. stamp.

If after a scire facias, and by default, after the words, "whereof the said C. is convicted, as appears to us of record," say, "And whereof it is considered in our
E e 4 " same

“ same court, before us, That the said A. have his execution against the said B. of the debt and damages aforesaid, by the default of the said B. as also appears to us of record; and have there then this writ.” *Witness, &c.*

The like in assault.

If in assault, say, “ for his damages which he sustained, as well by reason of a certain trespass and assault, lately committed by the said C. on the said A. at Westminster in your county, as for his costs, &c.”

The like in covenant.

If in covenant, “ for his damages which he sustained, as well by reason of a certain breach of covenant made between the said C. and the said A. as for his costs, &c.”

The like in ejectment.

For his damages, which he sustained as well by reason of a certain trespass and ejectment committed against the said A. by the said C. at E. in your county, as for his costs, &c.

Testatum, fi. fa. in Case.

George, &c. To the sheriffs of London, greeting: We command you, That you cause to be levied, &c. (to the end of the fi. fa.) damages aforesaid: And our sheriff of Middlesex, at a certain day now past, returned to us at Westminster, that the said C. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: Whereas it is testified in our same court, before us, that the said C. hath sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the damages aforesaid, and every part thereof; and have you there then this writ. Witness, &c.

Testatum part.

Testatum fi. fa. in Debt.

George, &c. To the sheriff of Middlesex, greeting, &c. (to the end of the fi. fa.) damages aforesaid: And our sheriffs of London, at a certain day now past, returned to us, that the said C. had not any goods or chattels in their bailiwick, whereof they could cause to be levied the debt and damages aforesaid, or any part thereof: Whereas it is testified in our same court before us, that the said C. hath sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the debt and damages aforesaid, and every part thereof; and have you there then this writ. Witness, &c.

N. B. If

N. B. If the proceedings be by *original*, add the defendant's addition as in the declaration; at the foot of the execution say, *and have there this writ*, and make it returnable on a *general* return day, as on the morrow of the *Holy Trinity*, wheresoever we shall then be in *England*.

If there is a levy on the *fieri facias*, and it be necessary to have a *testatum* for the residue, you must recite the first *fi. fa.* and sheriff's return thereon, and then command the sheriff to levy the residue. *Salk. 319. Oviatt v. Vyner.*

A Non omittas fi. fa.

George, &c. To the sheriff of *Norfolk*, greeting: We command you, That you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and cause to be levied of the goods and chattels in your bailiwick of *C. D.* (*the same as a fi. fa.*)

Testatum fi. fa. into Durham, in Case.

George, &c. To the Right Reverend Father in God, — by divine Providence lord bishop of *Durham*, greeting: We command you, that by our writ, under the seal of your bishoprick duly to be made, and to the sheriff of the county of *Durham* to be directed, you command him, that of the goods and chattels of *C. D.* in his bailiwick, he cause to be made 50*l.*; which *A. B.* lately in our court before us at *Westminster*, recovered

Fi. fa. for the Residue in Debt.

George, &c. greeting: Whereas (*to the end of the first fi. fa.*); and you at that day returned to us, That by virtue of that writ to you directed, you had caused to be made of the goods and chattels of the said *C.* in your bailiwick the sum of 40*l.* part of the debt and damages in the said writ mentioned; which money you had ready on the day and at the place in the writ mentioned, as by the said writ you was commanded; and that the said *C.* had not any other, or more goods or chattels in your bailiwick, whereof you could cause to be levied the residue of the said debt and damages, or any part thereof; therefore we command you, that you cause to be levied of the goods and chattels of the said *C.* in your bailiwick, 63*l.* 3*s.* residue of the said sum of 103*l.* 3*s.* which the said *A.* recovered against him

If by original.

Testatum for residue.

vered against him, for his damages, which he had sustained, as well by means of the not performing certain promises and undertakings, lately made by the said *C.* to the said *A. B.* as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted as appears to us of record; and have you the said money before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to render to the said *A. B.* for his damages aforesaid: And our sheriff of *Middlesex*, at a certain day now past, returned to us, That the said *C.* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: Whereas it is testified in our same court, before us, That the said *C.* hath sufficient goods and chattels in your county palatine, whereof the sheriff of your county palatine may cause to be levied the damages aforesaid, and every part thereof; and have you there then this writ. Witness, &c.

before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to render to the said *A. B.* for the debt and damages aforesaid: And our sheriff of *Middlesex*, on — next after the morrow of the *Ascension* last past, returned to us at *Westminster*, that

him in our said court, before us, for his said debt and damages; and have you that money before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to render to the said *A.* for the residue of the said debt and damages; and have you there then this writ. Witness, &c.

Fi. fa. de bonis ecclesiasticis,
in Debt.

George, &c. To the Right Reverend Father in God —, by divine Providence lord bishop of *Lincoln*, greeting: We command you, That of the ecclesiastical goods of *C. D.* late of, &c. clerk, in your diocese, you cause to be levied 1000*l.* for a debt which *A. B.* in our court, before us at *Westminster*, recovered against him; as also 63*s.* which were adjudged to the said *A. B.* in our same court before us, for his damages, which he had sustained, as well by occasion of the detaining that debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record, and have you the said monies

the said *C. D.* had not any goods or chattels, or any lay fee in his bailiwick, whereof he could cause to be levied the debt and damages aforesaid, or any part thereof; and that the said *C. D.* is a beneficed clerk, to wit, rector of the parish and parish-church of *W.* in the county of *B.* in the diocese of *Lincoln*; and have you there then this writ. Witness, &c. This writ is to be sealed, pay 7d. and sent to the register of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

Fi. fa. in Case against an Administratrix, where she confesses the Debt of the Testator, or on a Recovery.

George, &c. We command you, that you cause to be levied of the goods and chattels in your bailiwick, which were of *C. D.* at the time of his death, in the hands of *E.* administratrix of all and singular the goods and chattels, rights and credits, which were of the said *C.* deceased, at the time of his death, who died intestate, to be administered 40l. which *A. B.* lately in our court, before us at *Westminster*, recovered against the said *E.* administratrix as aforesaid, for his damages, costs, and charges, which he had sustained by reason of the non-performance of certain promises and undertakings made by the said *C. D.* in his lifetime, to the said *A.* whereof the said *E.* is convicted, as appears to us of record, if she hath so much thereof in her hands to be administered;

The like against an Administratrix in Debt.

George, &c. We command you, that of the goods and chattels in your bailiwick which were of *C. D.* at the time of his death, in the hands of *E.* widow, administratrix of all and singular the goods and chattels, rights and credits, which were of the said *C.* at the time of his death, who died intestate, to be administered, you cause to be levied as well a certain debt of 530l. which *A. B.* lately in our court, before us at *Westminster*, recovered against the said *E.* administratrix as aforesaid; as also 16l. which in our said court before us were adjudged to the said *A.* for his damages, costs, and charges, which he had sustained, by means of detaining the said debt, whereof the said *E.* is convicted, as appears to us of record, if she hath so much thereof in her hands

nistered; and if she hath not so much thereof in her hands to be administered, then that you cause to be levied 6l. 10s. being the costs and charges of the said *A.* and parcel of the damages aforesaid, of the proper goods and chattels in your bailiwick, of the said *E.* administratrix as aforesaid; and have that money before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to render to the said *A.* for his damages aforesaid; and have there then this writ. Witness, &c.

hands to be administered, and if she hath not so much thereof in her hands to be administered; then that you cause to be levied the said 16l. the damages and costs aforesaid, of the proper goods and chattels in your bailiwick, of the said *E.* administratrix as aforesaid; and have you that money before us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to render to the said *A.* for his debt and damages aforesaid; and have you there then this writ, Witness, &c.

N. B. *If it be against an executor, add the words, "Executor of the last will and testament of A. B. deceased."*

Fi. fa. for defendant's costs.

George, &c. We command you that you cause to be levied of the goods and chattels of *A. B.* in your bailiwick, 14l. 10s. which were awarded to *D. E.* in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his costs and charges by him expended in and about his defence, in a certain plea of trespass on the case (*as the action is*), prosecuted in our said court before us by the said *A.* against the said *D.*; and have you that money before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, and have you there then this writ. Witness, &c.

Sheriff may summon a jury if he have a doubt who goods belong to, —but this is to satisfy himself.

The sheriff summoned a jury to satisfy himself whether a claimant of the goods seized under a *fi. fa.* had a right or not. On motion to set aside the inquisition, and to have the goods sold for plaintiff's benefit; Lord *Kenyon*, This application is perfectly new in practice, and I am not sure it is founded in principle. This is a kind of inquest of office; it is merely to indemnify the sheriff in making his return to the writ, but it does not bind the right between the litigating parties;

parties; I do not know we have any authority to interfere: If we were to set aside the inquisition, I do not think we could order a new inquiry. Rule refused. *Roberts v. Thomas*, 6 Term Rep. 88. Vide *Dalt. Sher.* 146. *Imp. Sheriff*, 153. 514. *Gilb. on Execu.* 21. As soon as it becomes necessary to justice to inquire to whom the goods belong, the sheriff is bound to make that inquiry. *Lord Kenyon*. 4 Term Rep. 648. *Farr v. Newman*. Vide *Dougl.* 40. Such an inquisition is not evidence. Vide *H. Black. Rep.* 2. V.

For Costs on a Nonsuit.

George the third, &c.
To the sheriff of *Middlesex*, greeting: We command you, that you cause to be levied of the goods and chattels in your bailiwick of *A. B.* 14l. which were awarded to *C. D.* in our court, before us at *Westminster*, according to the form of the statute in such case made and provided, for his expences and costs, which he has been put to by reason of the false claim of the said *A.* in a certain plea of trespass on the case, prosecuted in our said court before us, by the said *A.* against the said *C.*; and have you that money before us at *Westminster*, on, &c. Witness, &c.

Venditioni exponas.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas we lately commanded you, that you should cause to be levied of the goods and chattels of *C. D.* 50l. which *A. B.* lately in our court, before us at *Westminster*, recovered against him for a debt; and also 63s. which, &c. (here recite the writ verbatim); and that you should have that money before us at *Westminster*, on, &c. to render to the said *A.* for his debt and damages aforesaid: And you at that day returned to us at *Westminster*, that you had levied of the goods and chattels of the said *C.* to the value of the debt and damages aforesaid; which said goods and chattels remained in

Here state the return exactly.

your hands for want of buyers: Therefore we being desirous that the said *A.* be satisfied his said debt and damages, command you that you sell, or cause to be sold, the said goods and chattels, and every part thereof, for the best price that can be got for the same, at least for the debt and damages aforesaid: so that you have that money arising from such sale, before us at *Westminster*, on, &c. to render to the *A. B.* for his debt

debt and damages aforesaid; and have there then this writ. Witness, &c.

Præcipe.

This writ is to be signed by Messrs. *Provost* and *Webb*, pay 1s. 8d. seal 7d. a *præcipe* is to be made for the office. *Middlesex, Vend. exponas* for *A. B.* against *C. D.* for 50l. debt and 63s. damages, returnable on, ——— next after ———.

If sheriff delay sale.

If the sheriff delays or refuses to sell, the legal and proper mode of compelling a sale is by writ of *venditioni exponas*, on which he must return the money into court. *Cowp.* 406. *Cameron v. Reynolds*. The sheriff is bound for the amount of his appraisement. *Ld. Ray.* 1075.

Elegit.

Elegit.

This is a judicial writ, given by the statute of *West.* 2. 13 *Ed.* 1. *stat.* 1. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's term be expired, as till the death of the defendant, if he be tenant for life or in tail. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken. A term of years may either be extended or sold, as part of the personalty. 8 *Co.* 171. A rent-charge may be extended. *Moor.* 32. So may lands in ancient demesne. *Hob.* 47. But a rent-seck, or copyhold lands, cannot. *Cro. Eliz.* 650. 3 *Co.* 9.

For the sheriff's duty, vide my Office of Sheriff, 162.

The stat. says, *the sheriff shall deliver to the plaintiff all the chattels of the debtor, (save only his oxen and beasts of his plough,) and the one half of his land, until the debt be levied, upon a reasonable price or extent.*

If no lands are extended, a *ca. sa.* may issue.

If the lands are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods only, upon the *elegit*, and the sheriff return *nihil* as to the land, a *ca. sa.* may issue for the residue against the defendant: for the election cannot be complete, unless the plaintiff has some benefit from the land, for the taking out the writ is not an actual

actual election, but only in order to an election; and if there be no lands, there is nothing to choose, and consequently no election; where there are no lands an *elegit* is no more in effect than a *feri facias*. *Hob. 58. Str. 226. Bacon v. Peck.* And so may a *fi. fa.* issue for the residue, if no lands be extended.

Upon an *elegit* the sheriff is to impanel a jury (but no notice thereof is given to the other side), who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements, and upon such inquisition, the sheriff is to deliver all the goods and chattels (*except the beasts of the plough*), and a moiety of the lands, to the party, and must return his writ, in order to record such inquisition. *2 Inst. 396.*

The sheriff does not put the plaintiff in possession; therefore, in order to recover, he must bring an ejectment.

If the sheriff finds goods, he may deliver them to the plaintiff by appraisement. *Ld. Ray. 346.*

This writ lies against *peers and members*, also against *executors and administrators upon a devastavit returned*; and it is said, may be sued *after a year without a sci. fa.* on awarding an *elegit* on the roll and continuing it. *Tidd. 751. Carth. 283.* But I take it, that there must be an *actual elegit* issued, before such entry will be suffered to be made. And if *any execution* is issued *within the year*, and awarded on the roll, an *elegit* may be issued after the year, without *sci. fa.* The entries of all issues and judgments were formerly made by the entering clerks, and I believe they awarded of course the execution on the roll, for which they were paid 2s. (*previous to the stamp duties*). without the writ being actually issued; in the same manner as they continued the *venires* on the issue roll.

Sheriff's duty.

It lies against peers, &c.

Elegit in Debt.

George the third, &c.
To the sheriff of Kent,
greeting: Whereas *A. B.*
lately in our court, before
us at *Westminster*, by bill,
without our writ, and by
the judgment of the same
court, recovered against
C. D.

Elegit in Case.

George the third, &c.
To the sheriff of Kent,
greeting: Whereas *A. B.*
lately in our court, before
us at *Westminster*, by bill,
without our writ, and by
the judgment of the same
court, recovered against
C. D.

To be signed by
Messrs. Provost
and Webb; pay
1s. 8d. seal 7d.;
to be ingrossed on
a 3s. 6d. stamp
parchment; a
priece is to be
made for the
office.

C. D. as well a certain debt of 100*l.* as also 63*s.* which in our said court before us were adjudged to the said *A.* for his damages, which he had sustained by means of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record, and because

C. D. 100*l.* which in our said court before us were adjudged to the said *A.* as well for his damages, which he had sustained by means of the non-performance of certain promises and undertakings made by the said *C.* to the said *A.* as for his costs and charges by him laid out about his suit in that behalf, whereof the said *C.* is convicted, as appears to us of record, and because

the said *A. B.* came into our court before us, and chose to have delivered to him all the goods and chattels of the said *C. D.* (*except the oxen and beasts of his plough*), and likewise a moiety of all and singular the lands and tenements of the said *C. D.* in your bailiwick, to hold to him and his assigns, as his free tenement, according to the form of the statute in such case made and provided, until he shall thereof have levied the said debt and damages; therefore we command you, that without delay, you cause to be delivered to the said *A.* by reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick (*except the oxen and beasts of his plough*), and likewise a moiety of all the lands and tenements of the said *C. D.* in your bailiwick, of which the said *C. D.* on the day of

(*the day the judgment was signed*) in the thirty-sixth year of our reign, on which day the judgment was given, or ever afterwards was seized, to hold to him the said *A.* the said goods and chattels, as his own proper goods and chattels, and also to hold to him and his assigns, a moiety of the said lands and tenements as his own free tenements, according to the form of the said statute, until he shall thereof have fully levied the said debt and damages: And in what manner you shall have executed this our writ, make appear to us at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, under your seal, and the seals of them by whose oath you shall make the said extent and appraisement; and have there then this writ. Witness, &c.

Kent.

Damages.

Damages.

Kent. Elegit for *A. B.* against *C. D.* for 100*l.* debt *Præcipe.*
and 63*s.* damages returnable on next after

A man may award on the roll as many *elegits* as he pleases, and execute all, or any, at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot sue out an *elegit* into another county; but an *actual writ* must be sued out, returned, and filed, before an award can be entered on the roll. May award on the roll *elegits*.

If on an *elegit* it is found, that the plaintiff was seised of the lands, at the time the judgment was given; upon an ejectment (which must be brought to recover the possession), the plaintiff need only give in evidence the office copy of the judgment, *elegit*, return, and inquisition thereupon filed, and is not bound to prove the party seised at the time of the judgment; if he was not seised, it must be proved by the other side. *Gilb. L. of E.* 10. *Vide Salk.* 563. *Ld. Ray.* 718. What proof is necessary to support an ejectment on an *elegit*.

If an *elegit* be returned that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any. *Str.* 874. *Stonehouse v. Ewen.* If no lands.

If there be several closes, or manors, or farms, or tenements, the sheriff is not bound to deliver a moiety of every particular close; but only certain tenements, &c. making in value a moiety of the whole. *Den v. Earl of Abingdon, Dougl. Rep.* 473. *Vide Brooke's Abr.* title *Elegit.* 54. *Plow.* 14. 1 *Salk.* 563. 1 *Sid.* 91. *Mr. J. Buller.*—It is agreed, that the moiety extended, must be set out by *metes and bounds*: I take the meaning to be, a moiety in value; which is ascertained by the jury. *Dougl.* 476. If several closes, &c. not bound to deliver a moiety of each particular.

Judgment by Default.

IF the defendant does not plead *within the time allowed by the rules of the court*, or confesses the action, the plaintiff may sign judgment against him by default, a rule to plead having been given, and demand made where necessary; and in this court a demand must be made (previous 24 hours) of the plea. *Dyche v. Burgoyne, 1 Term Rep.* 454. Judgment by default.

But if plaintiff delay signing his judgment after the time, and defendant pleads, it must be accepted; 1 *Term Rep.* But if delay made in signing.

Rep. 17. *Minnis v. Baxter*; and judgment cannot be signed.

This judgment is either *interlocutory* or *final*.

Definition.

Interlocutory judgments are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. Therefore, if the action be in *case*, *trespass*, or the like, (and where it only sounds in damages, except on promissory notes and bills of exchange,) the judgment is *interlocutory*, and there must be a writ of inquiry issued, directed to the sheriff of the county where the action is laid, to inquire by a jury what damages the plaintiff hath sustained, who is to return the inquisition to the court; whereupon the plaintiff's attorney taxes his costs, and signs final judgment; but if the plaintiff declares in debt, as on bond for a sum certain, or in any action wherein the *specific thing* sued for is recovered, the judgment is *absolutely complete*, and is called a *final judgment*.

If action be against two or more, and one pleads, the other suffers judgment.

In all *joint* actions upon *contract*, *debt*, *covenant*, &c. against *two* or more defendants, where *one* pleads, and the *other* lets judgment go by default; if he who pleads obtains a verdict, plaintiff shall not reap any benefit from his judgment by default; but it is otherwise in actions of *trespass* or *tort*. Lord Ray. 1372. *Biggs v. Benger*.

For what Judgment may be signed.

If a plea be delivered or filed before defendant has entered his appearance, (although he takes declaration out of the office,) plaintiff may file bail according, &c. and sign judgment; for he is not in a capacity to plead, until he is in court. So if a special plea be delivered instead of being filed; or if defendant do not rejoin, plead to a new assignment, or join in demurrer, or return the paper book in due time. Or where he pleads a plea not adapted to the nature of the action, as *nil debet* instead of *non assumpsit*. *Capitain v. Day*, T. 15 Geo. 3. Or if after craving oyer of a deed, he do not set forth the whole. 4 Term Rep. 370. Or if he pleads a plea in abatement after the four days. 1 Term Rep. 277. 689. Or enters *so vit ad diem* in the general issue book. *Lockhart v. Mackreth*, Trin. 34 Geo. 3. Or pleads a judgment recovered, or other plea,

plea, when under terms to plead issuably^a. 1 *Burr.* 59. ^a Vide p. 245.
 Or does not take the declaration out of the office before
 plea pleaded. 1 *Wils.* 173. Or files a *sham* demurrer,
 after an order to plead issuably. 3 *Burr.* 1788. Or
 pleads a plea of tender, without paying the money into
 court. 1 *Str.* 638. Or pleads before bail perfected.
 4 *Term Rep.* 579. Or where he files a *sham* de-
 murrer to the replication, when under terms to rejoin
gratis: or pleads a special plea without leave of the
 court, after rule to abide by the plea. 1 *Term Rep.*
 693. So if he is under an order to plead issuably, and
 one of the pleas be not so. 3 *Term Rep.* 105. *Water-*
fall v. Glode.

But although defendant be under such order to plead
 issuably, and put in a plea, though informal, which goes
 to the substance of the action; or if defendant pleads not
 guilty to an action of debt on a penal statute, the
 plaintiff cannot sign judgment as for want of a plea.
 1 *Term Rep.* 462. Nor can he sign it for nonpayment
 of the issue, paper or demurrer book. *R. H.* 35 *Geo.* 3.
 Nor for the nonpayment of the warrant of attorney.
 4 *Term Rep.* 370.

For what plain-
 tiff cannot sign
 judgment.

The plaintiff may sign judgment without the de-
 mand of a plea, after an order for time obtained, if
 such plea be not delivered or filed in time.

After order for
 time.

If there be an order for *two days* to plead, judgment
 cannot be signed, until the *third day* in the afternoon.

When on an
 order.

How to sign Interlocutory Judgment.

First enter on a roll, (which you get of Messrs. *Pro-*
vost and *Webb* at the *King's Bench* office,) warrants of
 attorney for the plaintiff and defendant, make also a
 memorandum thereon of the term in which the declara-
 tion was delivered or filed, then take a treble-penny
 stamp paper, and enter only the memorandum thereon,
 which take to the clerk of the judgments in the *King's*
Bench office, he will sign the same, pay 4d. per sheet,
 and 8d. filing the warrants of attorney. If the action
 be in debt, enter the judgment on a double half-crown
 stamp paper, make the entry on the roll as before,
 tax the costs with the master, and take out execution.

How to sign an
 interlocutory
 judgment by bill.

If in debt, judg-
 ment final.

A regular interlocutory judgment may be set aside,
 so as to let in the defendant to try the merits of his
 case; but it must be on payment of costs, and such
 merits

A regular inter-
 locutory judg-
 ment may be set
 aside.

merits likewise must appear upon an affidavit. *Str.* 823. 1242. 1 *Burr.* 568. A writ of inquiry was set aside, and defendant let in to plead a fair plea on payment of costs. *Salk.* 518. 6 *Mod.* 191. But as the rule is conditional, take care to pay the costs forthwith.

Irregular judgment may be set aside.

If plaintiff sign an interlocutory judgment *irregularly*, the court will set it aside upon an affidavit of the facts, in which affidavit "*shew the writ having issued, the delivery of the declaration, and the time when the rule to plead expired; or if you were upon terms of accommodation, shew the special matter, and the advantage taken:*" and as it is a rule to shew cause, no notice of motion is necessary.

Filing warrants of attorney.

By rule *M. 5 Ann.* it is ordered, that the defendant's attorney at the time of the delivery of the copy of the declaration, or taking thereof out of the office, shall pay 4d. for the warrant of attorney; if he refuse, plaintiff may sign judgment in such action by default.

Held that there is no instance of payment of such warrant of attorney.

In a motion to set aside a judgment, it appeared, plaintiff's attorney demanded a gross sum for the warrant of attorney, and for the copy of the declaration, and signed judgment for refusing to pay for the warrant. *Per Curiam.*—There is no instance in which judgment has been signed for not paying for the warrant of attorney, at least in *modern times*. The practice has been to make a demand for the warrant and copy of the declaration together; and it is admitted for not paying for the latter, judgment could not have been signed. *Rule abs. O'Neale v. Price, 4 Term Rep. 370.*

If defendant, when under an order to plead issuably, put in a plea, though informal, which goes to the substance of the action, plaintiff cannot sign judgment.

In an action for slander, the defendant being under a judge's order to plead issuably, delivered a plea, in which he attempted to justify the words, but it was not strictly speaking a justification; the plaintiff signed judgment as for want of a plea: rule to set it aside. *Per Curiam.*—If this plea cannot be supported, the plaintiff should have demurred to it, instead of signing judgment. Where indeed a plea has appeared on the face of it to be a dilatory plea, the court have in some cases gone the length of saying, that the plaintiff might treat it as a nullity. But this plea is not of that kind, for it goes to the substance of the complaint; though whether it be a formal and good plea it is not necessary to consider now; if it be bad, the plaintiff must demur to it. *Rule abs. Thelluson v. Smith. 5 Term Rep. 152.*

There

There were four counts in the declaration, *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry and executes it: the demurrer being determined, the court held the judgment regular, and that there was no occasion for a *nolle prosequi* to be entered on the roll, as to the three counts, until he enter final judgment. *Str.* 532. *Fleming v. Langton.*

When no occasion to enter a *nolle prosequi*.

If plaintiff finds he has signed judgment too soon, or irregularly, he may waive it, by applying to the clerk of the judgments to strike it out; but notice to defendant's attorney (if he knows it) is requisite to stay any proceeding he means to take.

When may be waived.

It appears to be the practice to sign judgment on the 2d *November* before the *essoin* day, in all cases where common bail is filed between the 2d and 6th *November*. 5 *Term Rep.* 65. *Wansey v. Moore.*

Practice as to signing.

Inquiry.

GENERALLY it is laid down, where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "*that the plaintiff ought to recover his damages, but because the court know not what damages the plaintiff hath sustained; therefore the sheriff is commanded by the oaths of twelve honest and lawful men to inquire into the said damages, and return such inquisition into court.*" This process is called a *writ of inquiry*, which is a judicial writ directed to the sheriff of the county where the action is laid; in the execution of which, the sheriff sits as judge, and tries by a jury subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained, who must assess some damages; the sheriff (on the fourth day after the return of the writ) delivers to the plaintiff's attorney his return, with the inquisition annexed; previous to which, *viz.* on the *return day* of the inquiry, there should be a rule for judgment given with the clerk of the rules, as hereafter.

Entry of the judgment.

Inquiry.

Demurrer.

In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

A writ of inquiry of damages is a mere inquest of office, to inform the conscience of the court, who, if they please, they may themselves assess the damages. And the courts have always exercised a power of setting aside inquisitions for *small* or *excessive* damages.

Where there is no Necessity for this Writ.

ACTIONS on bills of exchange, &c. no need of inquiry.

The court have now determined, where the action is on a *bill of exchange* or *promissory note*, they will on motion refer it to the master, to see what is due for principal, interest, and costs, and order final judgment to be signed for that sum (but it must be on an affidavit of the *cause of action*, and that *interlocutory judgment is signed for want of a plea*; it is a rule to shew cause only. Counsel's fee 10s. 6d.), without the execution of a writ of inquiry. *Shepherd v. Charter*, 4 Term Rep. 275.

Buller J.—Writs of inquiry are often sued out in cases where they are not necessary; as for instance, in an action in covenant for the payment of a sum certain. 2 Saund. 106. It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions on bills of exchange or promissory notes, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. *Thelluson v. Fletcher*, Dougl. 316.

When necessary.

But where the demand is *not certain upon the record*, a writ of inquiry must issue, as in trespass. *Yel.* 152. So in trespass on the case, replevin, &c. 3 Lev. 213. *Lut.* 211. 213.

In assumpsit on a foreign judgment must execute an inquiry.

The defendant having suffered judgment by default in an action of assumpsit, on a *foreign judgment*, the court will not refer it to the master to see what is due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. *Messin v. Lord Massarine & Wife*, 4 Term Rep. 493. Mr. J. Buller said, though debt will lie here on a foreign judgment, the defendant may go into the consideration of it.

Judgment

Judgment by default on a bill of exchange for 200*l.* For Irish money. *Irish money*, the court refused to refer it to the master, to see what was due for principal interest and costs; *Maunsell v. Lord Maffarine*, 5 *Term Rep.* 87.; the value of which is uncertain, and can only be ascertained by a jury. *Cro. El.* 536. *Cro. Jac.* 617.

If one defendant pleads to issue, and the other makes default, a writ of inquiry is awarded to prevent a discontinuance, but does not issue; for the jury which tries the issue, must assess the damages. 1 *Lev.* 141. 11 *Co. 6. a.* *Heydon's case.*

The want of a writ of inquiry is aided by the statute of jeofails. *Str.* 878. *Malleroy v. Jennings.*

Where damages are omitted to be given to an overseer defendant, on a verdict for him, a writ of inquiry shall issue, *Str.* 1021.; and a suggestion shall be entered on the roll for that purpose. *Rep. temp. Hard.* 139.

Of Notice of Inquiry.

When judgment is signed, give notice of executing the writ of inquiry, and eight days exclusive is sufficient in all cases, except causes in *London* and *Middlesex*, where the defendant lives above 40 computed miles from *London*, then 14 days notice must be given; and likewise except causes wherein no proceedings have been had within 4 terms, then a term's notice must be given: But if the proceedings have been staid by injunction for 4 terms, a term's notice is not necessary. *N. on R. M.* 4 *Ann.* (c).

The stat. 14. *Geo.* 2. c. 17. does not extend to notice of inquiry, therefore in country causes 8 days is sufficient. The notice must be exclusive of the day it is given.

A defendant resided upwards of 40 miles from *London*, but pending the action, removed his habitation nearer, it was held, that 8 days were sufficient.

And Sunday^a is to be accounted a day in these notices, unless it be the day on which the notice is given; 8 *Mod.* 91.; and short notice of inquiry, is the same as short notice of trial.

By the course of the court, the defendant ought to have 8 days notice exclusive of executing a writ of inquiry, as well as upon a judgment given upon de-

^a It cannot be executed on a Sunday. 1 *Str.* 387. *Hoyle v. Lord Cornwallis.*

- murrer, as upon a judgment given by default, inquiry of assets, &c. *Sty. Pract. Reg.* 369. title *Notice*.
- Sci. fi. inquiry.** There must be the same notice of executing a *scire fieri* writ of inquiry, as a common writ of inquiry. *Str.* 235. 623.
- Notice to attorney if he appears.** If an attorney has appeared, there must be notice given to him; if not, to the defendant, or left at his last place of abode.
- When new writ.** If a writ of inquiry be set aside for irregularity, there must be a new writ ingrossed. *Hil.* 13 *Geo.* 1. *Cole v. Vaughan. MS. Rep.*
- When a new inquiry will be ordered.** If the jury mistake in point of law, or give too small damages, the court will, on payment of costs, order a new writ, *Str.* 425. 1259.; but this must be on a special application.
- Inquiry executed on return day, good.** An inquiry executed on the day of *the return* is good. *Ld. Raym.* 1449. *Dyke v. Blackston.*
- The plaintiff may go on although he be bankrupt.** Plaintiff became bankrupt between the *interlocutory* and *final* judgment, and sued out the execution *in his own name*. Rule to discharge defendant. The court said, the bankruptcy of the plaintiff did not abate the suit; and that they had in several instances permitted the assignees to continue a suit commenced by a bankrupt in his name. *Rule discharged. Waugh v. Austen, 3 Term Rep.* 437.
- Term's notice.** Where a term's notice of trial is required, there must at the same distance of time be the like notice of executing a writ of inquiry. *Peyton v. Burdus, Str.* 1100. And such notice must be delivered *before the effoign day*.
- When to be left in London, &c.** *Ordered*, that when any writ of inquiry shall be made or sued out, to be executed in *London or Middlesex*, such writ shall be left at the office of the sheriff *the day before* the execution thereof. *R. Hil.* 23 *Geo.* 3.
- Where plaintiff concludes to the country on defendant's plea, and gives notice of trial on the book, the same notice shall serve for inquiry after judgment on demurrer.** In every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book, and thereupon the defendant, to hinder the trial of the issue, shall demur in law, upon the replication, or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment, the attorney for the defendant shall be obliged to accept of notice of *executing a writ of inquiry of damages*, from the time of notice of trial given upon the paper book; but

but then the plaintiff ought to give notice of the hour and place of executing the inquiry. *R. Hil. 8 Geo. 1.*

Trespass for assault and imprisonment against three defendants, who suffered judgment to go by default: The plaintiff executed three writs of inquiry, and the jury gave three separate damages. Motion in arrest of judgment, cited *1 Str. 422. Cro. Eliz. 860. 5 Burr. 2790.*—Whilst this rule was depending, plaintiff moved to set aside his own writs, and that another be issued; it was prayed on the part of defendant that his rule might be made absolute. *Lord Kenyon.*—The plaintiff's proceedings are certainly irregular; he has executed three writs of inquiry, where one would have been sufficient; and if he had entered up final judgment for the several damages, it would have been erroneous; but he has discovered his mistake in time, and upon payment of costs he may set aside his own proceedings. But there is no ground to arrest the judgment. In *Rodney v. Strode*, in trespass against three, two of whom pleaded, and one suffered judgment by default, the jury found 1000*l.* against one, 50*l.* against the second, and 50*l.* against the last; the plaintiff entered a *nolle prosequi* against the two last defendants, and took his judgment only against the first, it was held it cured the verdict. *Carth. 19 Per Cur.*—Let the rule for arresting the judgment be discharged, and the plaintiff's rule for setting aside his own proceedings on payment of costs be absolute. *Mitchell v. Milbank, 6 Term Rep. 199.*

Judgment against three defendants by default, three separate writs of inquiry executed will be set aside, but court will permit plaintiff to set aside all proceedings on payment of costs.

Take notice, that a writ of inquiry of damages in this cause will be executed on the day of instant, between the hours of ten and twelve of the clock in the forenoon of the same day, at the secondaries office, No. 10. Grocer-hall Court, London. Dated the day of 1796.

Notice of executing inquiry in London.

Yours, &c.

J. K. plaintiff's attorney.

To Mr. C. D. attorney for defendant.

If it is in *Middlesex*, say, "at the sheriff's office, No. 12. Took's Court, Cursitor-street, Chancery-lane, in the county of Middlesex," between the hours of eleven and one of, &c.

If in Middlesex.

Writs of inquiry of damages before the sheriff of *Middlesex*, in future, will be executed at the sheriff's office, No. 12. Took's Court, Cursitor-street, both in term

Notice in Middlesex.

term and vacation between the hours of eleven and one,
14 Sept. 1795.

If in the country. If in the country, say, "*will be executed at the house*
"*of L. W. commonly called or known by the name or sign*
"*of the* *in the High street, Oxford, in the*
"*said county.*"

What notice to express. The notice should express the *name* of the *house*, the
county, town, and street, and the time between hour
and hour must not be above two; and notice to exe-
cute *by ten* uncertain. *Str. 1142. Ison v. Fowen.*

Countermand. If you do not intend executing the inquiry on the
day, you may countermand same, by giving notice
thereof: two days countermand will do in town causes.

Continuance. A notice of inquiry may be continued over to an-
other day, but not more than once in a term. *Str.*
1119. Green v. Gifford. You may continue two
days before it is executed, to any other day.

Notice of coun- I do hereby countermand the notice of executing
termand. the writ of inquiry given you in this cause. Dated,
&c.

Notice of conti- I do hereby continue the notice of executing the
nuance. writ of inquiry given in this cause to the day
of next, when the same will be executed be-
tween the hours of, &c. at, &c. Dated, &c.

Costs. Costs may be recovered for not executing a writ of
inquiry, the same as for not going to trial. *Str. 728.*
Sutton v. Bryan. And the court said, it was as reason-
able, as in case of a trial. *Ibid.*

Costs. Costs are taxed of course on inquiry, though plain-
tiff should not recover 40s.

Set aside because jury men were prisoners for debt. A rule to set aside inquisition executed at the assizes
before jury men some of whom were *debtors taken out of*
prison for the purpose; the defendant's attorney attended
the execution of the writ. *Lord Kenyon.*—My doubt
at first was, whether the defendant had not waived
taking the advantage of this objection by appearing be-
fore the sheriff, but for the precedent's sake we ought
to set aside this inquisition: If the sheriff had been
made a party to the rule, perhaps the court would have
made him pay the costs of the application. *Rule abs.*
Stainton v. Beadle, 4 Term Rep. 473. The court held
there was no objection to *javelin men.* *Ibid.*

Writ of inquiry by bill. *George the third, by the grace of God of Great Bri-
tain, France, and Ireland king, defender of the faith,*
&c. To the sheriffs of *London*, greeting: Whereas

John

John Denn, lately in our court before us at *Westminster*, by bill without our writ, impleaded *Richard Fenn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself: For that whereas (set forth the whole declaration *verbatim*), to the said *John*, his damage of 100*l.* as he saith, and such proceedings were thereupon had in our said court before us, that the said *John* ought to recover his damages by means of the premises; but because it is unknown to our court before us, what damages the said *John* hath sustained by means of the premises; therefore we command you, that by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the said *John* hath sustained, as well by means of the premises aforesaid, as for his costs and charges by him about his suit in this behalf expended, and make appear to us at *Westminster*, on Friday next after the morrow of the *Holy Trinity*, the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, and have there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the 9th day of *May* in the thirty-sixth year of our reign.

This writ will serve for any action.

Mansfield and Way.

To be ingrossed on a 3*s.* 6*d.* stamp parchment, and only sealed, pay 7*d.* leave it at the sheriff's office for execution, first indorsing on it, the day it is to be executed; pay in *London* 1*l.* 9*s.* 4*d.* if no witnesses, and 4*d.* for every witness; in *Middlesex* 1*l.* 10*s.* 4*d.*; other counties 1*l.* 11*s.* 6*d.*; attend the execution on the day. On the day, you attend the sheriff's deputy and the jury, with evidence to prove the plaintiff's demand, or damages sustained, and the defendant is at liberty to produce witnesses in mitigation, for the jury must give some damages.

How to be ingrossed.

The jury may give interest on a note, bill of exchange, and money lent; and a promissory note need not be proved but produced, to see if any money is indorsed as paid off. *Str.* 1149. 3 *Wils.* 155. Defendant shall not give in evidence fraud, for he admits the contract as declared. *Str.* 612. For goods sold, work done, money paid, lent, had and received, you must give evidence.

Interest on note, &c.

Evidence necessary.

If action be against two, and both suffer judgment, the damages cannot be severed; 1 *Str.* 422.; but if one demurs,

When damages may be severed, and when not.

demurs, and the other suffers judgment by default, damages may be severed, because they have severed in their plea. *Ibid.* 1140.

Rule for judgment.

On the day of the return, give a rule for judgment at the clerk of the rules, naming your cause on a slip of paper, and writing on it, "*Rule for judgment on inquiry,*" pay 1s. 10d. It expires in *four days* next after it is given. *Sunday* (or any holiday on which the court does not sit) is not reckoned a day: it may be entered at any time within four days after the term, *N. on R. E.* 5 *Geo.* 2. but *Sunday* is no day. They must be *four full court days*, a *dies non* is excluded. Get inquisition from the sheriff, carry it to the stamp-office, and stamp it with a double 2s. 6d. stamp, tax the costs with the master, pay 2s. 6d. and defendant may have a rule from the clerk of the rules to be present, if he thinks fit; pay 4s. 6d. a copy of which is to be served on the attorney for plaintiff; after this, plaintiff may take out execution, if served with no allowance of a writ of error.

For what may move to let inquisition aside.

Str. 425. 515.
1259. 940. 2 T.
Rep. 201.

The defendant may move to set aside the inquisition, *for want of due notice, objection to the jury, or mode of returning them, or that they were returned by plaintiff's attorney, or for excessive damages.* 4 T. Rep. 473. Cowp. 112. 2 Leon. 214. 3 Burr. 1846. In like manner plaintiff may move to set it aside, when it is *obvious damages are too small, except in vindictive, hard, or trifling actions.*

Witnesses.

If witnesses will not voluntarily attend the execution, the party wanting their testimony may make out a *subpœna*, which is as follows:

Subpœna on inquiry.

George the third, &c. to (here insert the witnesses names, there may be four in each writ). We command you, and every of you, that setting aside all and singular businesses and excuses whatsoever, you, and every one of you, be and appear in your proper persons, before our sheriff of the county of *Middlesex*, on the day of next, at 11 of the clock in the forenoon, at the sheriff's office in *Took's Court, Castle-yard*, in the county of *Middlesex*; (if in *London*, say) before our sheriffs of our city of *London*, at their office in *Grocers-hall Court*, in the *Poultry, London*; (if in the country, say, before *A. P. Esq.* our sheriff of the county of *Oxford*, at the house of commonly called or known by the name or sign of the

in the *High-street, Oxford*, in the said county,) there to testify the truth of all and singular those things, according to the best of your information and knowledge, which you, or any of you know, in a certain cause now depending in our court before us, between *A. B.* plaintiff, and *C. D.* defendant, of a plea of trespass on the case (as the action is) on the part of the plaintiff, on which our certain writ of inquiry of damages hath been sent by us, out of our said court, and directed to our said sheriff, then and there in due form of law to be executed; and this you, nor any of you, shall in nowise omit, under the penalty of 100*l.* Witness *Lloyd* lord *Kenyon* at *Westminster*, the 9th day of *May* in the 36th year of our reign.

Mansfield and Way.

To be ingrossed on a 3*s.* 6*d.* stamp piece of parchment. It must be signed by Messrs. *Provost* and *Webb*, and sealed; pay signing 1*s.* 8*d.* seal 7*d.* serve witnesses with a copy, pay 1*s.* each, and make a note for the office thus:

London, to wit: *Subpœna* to testify on inquiry between *A. B.* plaintiff, and *C. D.* defendant, on the part of the plaintiff. *J. K.* attorney.

N. B. If either party attend by counsel, notice must be given, or will not be allowed in costs.

Confession of the Action.

A *cognovit* by the principal without notice to the bail, does not discharge them. *Hodgson v. Nugent*, 5 *Term Rep.* 277. Cognovit by principal.

If a *cognovit* be taken from a prisoner, an attorney for him should be present. 3 *Term Rep.* 616. *Parkinson v. Caines.* If taken of a prisoner.

In order to prevent the execution of a writ of inquiry, &c. frequently the defendant (to save the costs) confesses the action, or his attorney does it for him, with a stay of the execution; which confession is generally wrote in the margin of the declaration, or it may be done on plain paper thus: *I confess this action; and that the plaintiff hath sustained damages to the amount of 20*l.* besides his costs and charges, to be taxed by the master; and no judgment shall be entered up, or execution issued until the* day of *next*, in default of payment Cognovit.
Take it in double the debt.
As this is settled, there need no 6*s.* stamp.

payment of the sum of 10l. being the debt in this action. And that no writ of error shall be brought, nor any bill in equity filed: and that in case the plaintiff shall enter up his judgment, he shall be at liberty to levy the said 10l. together with all costs, sheriff's poundage, and all other fees. As witness my hand, &c.^a

If in debt.

If the confession be in an action of debt, then it may be, "I hereby confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of 11. besides his costs and charges, to be taxed by the master, to be paid as follows, &c." as above.

How to sign judgment after confession.

If the confession is, that the judgment shall be entered up, sign it on a double half-crown stamp paper, as it is final; but you do not pay for the entries a-new, nor is there occasion for a new roll; pay 2s. 6d. for the secondary's fee, and 6d. for the further entry of the judgment, and make the entry on the judgment paper only, as far as the end of the memorandum.

Inquiry before the Chief Justice, &c.

Writ of inquiry before the chief justice.

There are cases upon which application may be made to the court to have the writ of inquiry executed before the chief justice at the sittings, or before the justices of assize; but leave is seldom granted, unless the case is very special, as where the law is mixed with the fact, or it appears to be of too much consequence for the sheriff to undertake, in which case, the jury set their hands and seals to their verdict; and, upon the trial, the judge of *nisi prius* is only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement at the trial, the judge is to sign it, and afterwards the court may be moved to have it made a rule of court. 12 Mod. 519. 610.

How to apply.

The way to apply is, to make affidavit, *setting forth the circumstances of the parties, plaintiff and defendant, and the nature of the action*, on which the court will grant a rule to shew cause, and in case of success, the rule will be for the sheriff to summon a good jury. But I do not think there can be a special jury in this case granted, if contested, (the act not extending to an

^a The costs are usually paid down; otherwise they must be added to the debt.

inquiry); and at all events if there be one granted, yet defendant has no right to pay those fees^a.

If the rule is made absolute, a *common writ of inquiry directed to the sheriff is made out*; and the notice ought to be for the sittings or assizes generally, and not for any particular day. *Barnes, 135.*

Inquiry and notice.

The writ of inquiry is sent to the sheriff, and enter the cause with the marshal the same as a record, pay the same fees; the sheriff returns the inquisition as usual, and takes his fees as usual; give a rule for judgment on the return day, and proceed as before.

How to enter cause.

By consent, in vacation, an order may be obtained from a judge to execute an inquiry before the judge of assize, and he will make an order for the clerk of the rules to be at liberty to draw up a rule for that purpose, on producing counsel's hand.

By consent, an order may be had in vacation.

Mr. Justice Buller granted an order to execute a writ of inquiry in an action of covenant without an affidavit, where some legal knowledge was necessary, and the damages went for, was about 600*l.* *Trin. Vac. 1791.*

If executed before the chief justice, it may be adjourned to the next sitting; but if on account of a witness, the plaintiff must pay costs. *Str. 853. Coleman v. Mawbey.*

It may be adjourned.

Retraxit of Plea.

It is very common after plea pleaded to confess the action; in this case, in the confession it is necessary to add, that defendant consents to withdraw his plea, and that plaintiff may take judgment, in order that a *retraxit* may be entered by the master, who will not do it unless the attorney for the defendant be present. Enter all the pleadings on the roll, with the relinquishment of the defendant's plea; take same to the clerk of the judgments, who will enter them, and sign the judgment on a double 2*s.* 6*d.* stamp, then go to the master, and he will enter the *retraxit* in the margin of the roll, but the entry on the roll must be complete.

Formerly it could not be done if defendant did not appear in person. 2 *Cro.* 211. 8 *Co.* 586. 1 *Salk.* 89.

^a I remember a motion being made for the sheriff to return a good jury; but this will be attended to on application, and staying to the clerks in the office in town, or under-sheriff in country, without. Whilst I was in office, I summoned a better jury many times, than in common cases.

Entering

Entering Judgment on Warrant of Attorney.

It happens frequently, that after the defendant is arrested and proceeded against, the plaintiff, in order to prevent further litigation, accepts a warrant of attorney for his demand, with a defeasance payable by instalments; if it so happen, and the defendant be in custody, the following rule must be observed:

No bailiff, &c. to take any warrant to acknowledge a judgment but in presence of an attorney for the defendant.

It is ordered by the court, that no bailiff nor sheriff's officer shall presume to exact or take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged. And if any bailiff or sheriff's officer shall hereafter offend, or do contrariwise, he shall be severely punished for so doing: And it is further ordered, that no attorney shall from henceforth acknowledge or enter, or cause to be acknowledged or entered, any judgment by color of any warrant gotten from any defendant being under arrest, otherwise than as is aforesaid. *E. 15 Car. 2.*

Plaintiff's attorney.

Warrant of attorney by person in custody not valid, unless his attorney be present, and a witness to the due execution.

Extends to warrants executed in Ireland.

Upon this rule it was deemed sufficient for the plaintiff's attorney to be present, and subscribe the warrant as attorney for the defendant. *5 Mod. 144.* But by rule *E. 4 Geo. 2. it is ordered*, that no warrant of attorney, for confessing a judgment executed by any person in custody, shall be valid or of any force, unless there be present some attorney on behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature of such warrant before the same is executed, who shall subscribe his name as a witness to the due execution.

These rules extend to warrants of attorney executed abroad; and the court said, the plaintiff, if he would make use of this court, must conform to its rules, comparing it to the case of stamping foreign deeds, before they can be read here. *2 Str. 1247. Fitzgerald v. Plunket.*

a Every warrant of attorney should be given voluntarily, and for a good consideration; and cannot (without leave) be entered up after the year and day elapsed from the date, and the judgment being in debt, is always final.

An

An attorney, whether of the one court or the other, is sufficient. *Bland v. Pakenham*, 1 Str. 530.

This rule does not extend to cases where the defendant is in custody upon an *execution*, but only where he is in custody upon *mesne process*. The reason of this distinction is, that where a man is arrested upon *mesne process*, the debt is not liquidated, and therefore under duress, he may be prevailed upon to confess more than is really due; but upon an *execution* the debt is liquidated, and therefore the only purpose of defendant's giving a warrant of attorney is such case is, to procure his liberty.

Construction of Rule E. 15 C. 2.

If indeed it could be shewn that a party even in *execution* had been prevailed upon to acknowledge a judgment for *more money* than was really due, the court would give relief under the circumstances. Because cases of fraud and imposition are exceptions to all rules. *Fell v. Riley*, Cowp. Rep. 281.

If confessed for more than due.

Prisoner in execution paid part of the debt, and executed a *new warrant* of attorney, *without an attorney being present*, the court held it was well given; for the defendant had a benefit by it in gaining time, and the second rule must be construed *being in custody as aforesaid*; the only intent of that being, to make it necessary to have an attorney *on the part of the defendant*; whereas under the former rule, an attorney for the plaintiff was sufficient. *Watkins v. Hanbury*, 2 Str. 1245.

New warrant executed.

It was declared that the general rule of E. 15 Car. 2. about the necessity of an attorney for the defendant being present, whenever a person in custody gives a warrant of attorney to confess judgment, is confined to judgment in the *particular cause* whereupon *he is in custody*, and does not extend to warrants of attorney given to confess judgment in *other actions*; for, in the first case, the attorney being present, is to avoid all practices on the part of the plaintiff, and to see it is done without duress of imprisonment; in the other, the plaintiff has no power over the defendant. 3 Burr. 1793. *Holcombe v. Wade*. 2 Ld. Raym. 797. 5 Mod. 144. Cowp. 142.

When no necessity for an attorney to be present.

If it is given to a *feme sole*, and she marries before judgment is entered up, application must be made to the court, for leave to enter it up by the husband and

How to enter it up if given to a feme sole, who afterwards marries.

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wife,

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wife, founded upon an affidavit, proving their marriage. 3 Burr. 1469. *Marder et Ux. v. Lee.*

If to two, and one dies.

If a warrant of attorney be given to two, and one dies before judgment entered, leave will be given to the survivor to enter it up. 1 Wils. 312. *Todd v. Dodd.*

Feme sole trader.

A married woman, though a *feme sole* trader, cannot give a warrant of attorney to confess a judgment. *Caudell v. Shaw*, 4 Term Rep. 363. Such a woman gave a warrant of attorney, and the judgment was set aside. *Ibid.* 362. *Read v. Jewson.*

If obtained by fraud.

The court will order a warrant of attorney to confess judgment, to be delivered up, if obtained by fraud, before any use has been made of it; *Buller J.* observing, that the court had the same jurisdiction as if the judgment had actually been entered up. If it were otherwise, he said, the consequences would be extremely inconvenient; for the judgment might be entered up in the vacation, and defendant taken in execution, before any application could be made to the court. *Doug. Rep.* 196. *Duncan v. Thomas.*

Feme covert.

If given by an *infant*, court will order it to be delivered up. 1 Str. 20. But where a *feme covert* gave one, and afterwards moved to set aside the judgment because *she was covert*, court would not relieve her, but put her to her writ of error. 1 Salk. 400.

Will not set it aside, if given with a view to cheat.

The court will not set a warrant of attorney aside, on account of its being given by a defendant in custody, without an attorney present on his part. if executed by the defendant *purposely with a view to cheat the plaintiff.* *Gillman v. Hill*, Cowp. Rep. 141.

A warrant to confess, executed by a prisoner on criminal process, is good, though he have no attorney.

At the time warrant of attorney was executed, defendant was in custody under *criminal process*, and not against plaintiff: Motion to set it aside. Court held, the rule did not extend to this case, and discharged the rule. *Charlton v. Fletcher*, 4 Term Rep. 433.

A cognovit taken of defendant in custody without presence of his attorney, bad.

After interlocutory judgment, the plaintiff's attorney took a *cognovit* for 200l. of defendant in custody of the Marshal as plaintiff, with a discharge for 49l. 12s., and 8l. 5s. costs. The defendant at the time objected to signing it, and desired it might be shewn to his attorney; but on plaintiff's attorney telling him, that it was *unnecessary*, he signed it, no attorney on his behalf being present: Motion to set aside the proceedings for irregularity. The court said,

this case was not strictly within the rule of 15 *Car.* 2. They thought the plaintiff's attorney had acted improperly in taking a *cognovit* for 200*l.*, notwithstanding the defeasance, as no attorney was present on behalf of defendant; and were about to make the rule absolute *on that ground*, when *Gibbs* suggested, as the rule was drawn up on the ground of *irregularity*, the defendant was not strictly entitled to make it absolute on the latter ground; but he offered to have the judgment altered to 49*l.* 12*s.* instead of 200*l.* the plaintiff paying the costs of the application, by allowing it out of the debt, which the court ordered. *Parkinson v. Eamer*, 3 *Term Rep.* 316.

Woodward gave a warrant of attorney to confess a judgment, and died within a year after in time of vacation, before the *essoign-day* of the subsequent term, which was *Easter* term: the attorney, after his death, entered up the judgment as of the preceding term, but brought not the roll in before the *essoign-day* of *Easter* term; and it was moved to have the judgment set aside, the warrant of attorney being revoked by the death of the party. *Holt C. J.* If the party dies in the vacation, the attorney may enter up judgment that vacation, as of the preceding term, and it is a judgment at the common law, as of the preceding term, though it be not so upon the statute of frauds in respect to purchasers, but from the signing; so this judgment is good. *Oates v. Woodward*, 1 *Salk.* 87. 2 *Ld. Ray.* 766. 2 *Str.* 882. *Fuller v. Jocelyn*.

A judgment entered up by an attorney's clerk, who used the name of a regular attorney, but without his knowledge or consent, was set aside. 5 *Burr.* 2660. *Hopwood v. Adams*.

On 12th *November*, about twelve at noon, motion to enter up judgment on an old warrant of attorney was moved for on the usual affidavit, and court made the usual rule: Motion at another day to discharge it, on affidavit that defendant died *the day the first motion was made, at seven in the morning*. The court declared that if it had then appeared that the man was dead, they would not have made the rule, but they applied the maxim *feri non debet, factum valet*, to this case, and suffered the deceit to prevail. *Chancy v. Needham*, 2 *Str.* 1081.

When to enter it up if defendant dies.

Judgment entered by an attorney's clerk, who used the name of a regular attorney, set aside. Defendant died before motion made to enter up judgment.

One executor.

The warrant given by one executor, will not justify the entering a judgment against all. 1 *Str.* 20. *El. wel v. Quash et al.*

It cannot be entered after plaintiff's death. *Ibid.* 718. *Wild v. Sands.*

A warrant of attorney and release of errors is good in one instrument. *Ibid.* 1215. *Landon v. Pickering.*

Cannot enter judgment on warrant of attorney after plaintiff's death, unless the words executors, &c. If A. indebted to B. and C. after being sued to judgment and execution by B. go to C. and voluntarily give him a warrant on which judgment is immediately entered, and execution levied on same day on which B. would have been entitled to execution, and threatened to sue it out, the preference so given by A. to C. is not unlawful.

Leave will be given to enter up a judgment on an old warrant of attorney at the suit of an executor, if the words are, *at the suit of the plaintiff, his executors, &c.* after the death of the plaintiff, but not otherwise. *Barnes* 44.

In *Easter* term 1791, *Shepherd* obtained a judgment against one *Charter*, who brought error, and delayed execution until *Easter* term 1792, when judgment was affirmed. On 7th *May*, the costs in that suit were taxed, requesting time, but refused. On the 8th, *Charter*, knowing *Shepherd's* intention to take out execution, which he was entitled to sue out that day, went to plaintiff *Holbird*, who was a creditor, informed him of his situation, and executed a warrant of attorney, on which judgment was immediately entered up, and execution sued out and delivered to the sheriff two hours before *Shepherd's* execution reached the sheriff's office. Sheriff levied under *Shepherd's* execution, and returned *nulla bona* to the plaintiff's—Action for false return to *fi. fa.* against *Charter*. Lord *Kenyon* said, This was not an undue preference, and plaintiff had a verdict.—Motion to set it aside; saying the warrant of attorney was void by 13 *El. c. 5.* Lord *Kenyon*—There was no fraud in this case. The plaintiff was preferred by his debtor *Charter*, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice. The words of the statute do not apply to this case; the warrant was given on a good consideration; and the other words in the act "*bona fide*" only apply to those cases where possession is not delivered, or where it is merely colorable. *Rule disch. Hollird v. Anderson*, 5 *Term Rep.* 235.

If warrant of a particular term.

If a warrant be given to appear and confess judgment of a particular term, the judgment must be entered of *that term*, and not of any other, 7 *Mod.* 53; but

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but if it state a term, and also of a *subsequent term*, it may be entered of *that* stated, or any *other* subsequent term. *Ibid.*

When Motion necessary to enter up the Judgment.

Within a year and a day next after the date of the warrant of attorney, judgment may be signed, without applying to the court or a judge; but if not signed within that time, **in term time**, the court must be moved for leave to **enter** up the judgment on an *affidavit of the debt being due, the due execution of the warrant of attorney, and that the defendant is alive*; and the court expect to be informed *when the defendant was alive*; and any time within a *week* from the swearing the affidavit, if the party lives in the *country*, is sufficient; if in *town*, *two or three days*.

If the warrant of attorney be *above ten years old*, the motion must be made in court, on the like affidavit, for a judge will not make an order in *vacation*.

The judgment should be *docketed* forthwith, or it will not bind the executors against the payment of other demands, *such judgment* being on a level with *simple contract debts*. *Hickey v. Hayter*, 6 Term Rep. 384.

The plaintiff, 19th May 1795, in *Easter vacation*, signed judgment on warrant of attorney; the defendant died on 5th May in *Easter term*, and execution issued *tested* on the last day of *that* term. Judgment not docketed till 9th June; the court held the judgment regular, but set aside the execution; saying plaintiff should have sued out a *sci. fa.*, and set aside the execution. *Heapy v. Parris*, 6 Term Rep. 368. And the court said, a judgment debt is a debt of a *superior nature*, and when *docketed*, is to be paid before *simple contract debts*. *Vide* title *Execution*, p. 422. where this is more at large. *Vide*, if the execution had been *tested in his life-time*, 12 Mod. 5. 2 Ld. Ray. 850. 7 Mod. 95. Gilb. Ex. 15, 16. 1 Mod. 188. Comb. 33.

How to apply in Vacation.

If judgment is to be signed in the vacation, take the affidavit to a judge's chambers, who will make an order to enter up same; pay 4s.; no counsel's hand is requisite.

If it is signed in term, you get counsel to move for leave to enter up judgment; pay 10s. 6d. draw up rule

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at

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at the clerk of the rules ; pay 5s. if a country affidavit, 2s. filing ; then sign judgment on a double half-crown, as hereafter.

A. B. plaintiff,
and

In the *King's Bench*.

C. D. defendant.

Affidavit.

A. B. of, &c. the above-named plaintiff, and *E. F.* of, &c. gentleman, severally make oath, and say, and first this deponent *A. B.* for himself saith, That the above-named defendant *C. D.* being justly indebted unto this deponent in the sum of 20l. for money paid for the said defendant, did, in order to secure unto him the same, execute unto this deponent a warrant of attorney, bearing date the 10th day of *January* 1785, thereby authorising certain attornies therein named, or any other attorney of this court, to appear for him the said *C. D.* as of the then last *Michaelmas* term, or any other subsequent term, and then and there to receive a declaration for him in an action of debt, for 40l. for money borrowed, at the suit of this deponent, and to confess the same action, or else to suffer a judgment by *nil dicit* or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record of this court. And this deponent further saith, That there is justly due and owing to him this deponent, for principal money and interest thereon, the sum of 22l. 11s. (or the sum of 10l. the defendant having paid the sum of 12l. 11s. part thereof, as the case is) ; and that he verily believes the said defendant is living, he this deponent having seen and conversed with him about ten days since. And this deponent *E. F.* for himself saith, That he was present, and did see the said warrant of attorney executed by the said defendant, and that the name *C. D.* set and subscribed at the foot thereof, is of the proper hand-writing of the said *C. D.* and that he did sign, seal, and, as his act and deed deliver the same in the presence of this deponent ; and that the name of *E. F.* set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.

How to sign
judgment.

The judgment is signed upon a double half-crown stamp, and common bail must be filed, *R. H. 1 W. & M.* and a memorandum or minute must be filed on a 2s. 6d. stamp with the clerk of the bails, as directed by the *stat. 25 Geo. 3. c. 80.* ; first enter the warrants of

of attorney on the roll, then the memorandum of the term you sign the judgment. *See the whole entry, title Judgment*

In the *Kin's Bench*.

A. B. is retained to enter up judgment on a *cognovit* (or warrant of attorney to acknowledge judgment, as the case may require). Dated on the day of at the suit of *C. D.* against *E. F.* The memorandum or minute.

Entered or filed of
record, this } *A. B.* attorney, (if by an agent
day of } add) by *G. H.* his agent.
36 *Geo.* 3.

If the bond on which the warrant is given be above twenty years old, the court grant a rule to shew cause only. But where, on such a bond, the party had *admitted the debt within two months preceding the motion*, the court granted the rule absolute in the first instance, *Blakeley v. Vincent, Tr. T. 35 Geo. 3.* If above twenty years old.

The defendant was in execution in *September 1785*, a commission issued, and he was declared bankrupt. Soon after, and to obtain his liberty, he gave plaintiff a bond and warrant of attorney to confess judgment for the old demand. That being put in force, motion, why he should not be discharged out of custody, he having obtained his certificate. The ground was, that no attorney was present at the execution of the warrant of attorney; or supposing it to be good, yet the debt might have been proved under the commission. *Per Cur.* This is certainly to be considered in the light of a *new debt*, arising upon a *new consideration*, because the bond and warrant were given, in order to procure defendant's liberty. The old debt was thereby extinguished. *Rule disch. Birch v. Sharland, 1 Term Rep 715. Vide Vigers v. Aldrich, 4 Burr. 2482. S. P. 1 Term Rep. 559. Jacques v. Withy.* If a bankrupt to gain his liberty execute a new warrant of attorney and bond for same debt, it is an extinguishment of the old debt, and he shall not be discharged, although he had his certificate.

The court will, if a warrant of attorney is given for an *usurious debt*, direct an issue to try the same. *Cox v. Jones, Cowp. Rep. 727.* As there can be no plea to a *scire facias* of this sort. When will direct an issue.

Judgments.

ENTRY on the roll, of an interlocutory judgment, award of inquiry, and final judgment thereon, where declaration is of a former term (by bill).

As yet of the term of Easter, in the 36th year of the reign of king George the third. Witness Lloyd lord Kenyon, 1796.

Warrant of attorney for plaintiff.

London, (ss.) John Denn (the plaintiff) puts in his place, J. J. his attorney, against Richard Fenn (the defendant), in a plea of trespass on the case.

For defendant.

London, (ss.) the said Richard Fenn, in his own person, at the suit of the said John Denn, in the plea aforesaid.

Memorandum.

London, (ss.) Be it remembered, That in Hilary term last past, before our lord the king at Westminster, came John Denn, by J. K. his attorney, and brought into the court of our said lord the king, before the king himself, then there, his certain bill against Richard Fenn, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit, London, (ss.) John Denn complains of Richard Fenn, (here insert the whole declaration exactly to the word suit, &c.) then in a new line add the judgment as follows:

Imparience.

And now at this day, (that is to say,) on Wednesday next after fifteen days of Easter, in this same term, until which day the said Richard had leave to imparle to the said bill, and then to answer the same, &c. at which day, before our said lord the king at Westminster, came as well the said John, by his said attorney, as the said Richard, in his own person, and the said Richard defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said John, by which the said John remains therein undefended against the said Richard, for which the said John ought to recover against the said Richard his damages by occasion of the premises: But because it is unknown to the court of our lord the king now here, what damages the said John hath sustained, by reason

reason of the premises aforesaid; it is therefore commanded to the *sheriffs*, that by the oath of twelve good and lawful men of their bailiwick, they diligently inquire, what damages the said *John* hath sustained, as well by the means aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take to our lord the king at *Westminster*, on

If in Middlesex, say, sheriff.

next after under their seal, and the seals of those by whose oath they shall take the said inquisition, together with the writ of our said lord the king, to them thereupon directed; the same day is given to the said *John*, at the same place. At which day before our said lord the king at *Westminster*, came the said *John*, by his said attorney, and the sheriffs, to wit,

Return of inquiry.

Esq. and *Esq.* sheriffs of the said city, returned, a certain inquisition indented, taken before them at No. 10, *Grocers-hall Court, London*, in the parish of *St. Olave-Jewry*, in the ward of *Cheap*, in the same city, on the day of

Sheriff's inquisition, state it exact.

in the 36th year of the reign of our sovereign lord the now king, by the oath of twelve honest and lawful men of their bailiwick; by which it was found, that the said *John Denn* hath sustained damages, by occasion of the premises, over and above his costs and charges, to 20l., and for those costs and charges to twenty-nine shillings and four pence.

Therefore it is considered that the said *John* recover against the said *Richard* his damages aforesaid, by the said inquisition above found; and also 9l. 10s. 8d. for his said costs and charges by the court of our said lord the king now here, adjudged of increase, to the said *John*, by his assent; which damages in the whole amount to 31l. and the said *Richard* in mercy, &c.

Judgment signed day of 1796.

Mercy.

If the declaration be of *one term*, and the interlocutory judgment of *another*, there must be an imparlance entered, so as to continue the pleadings over from the delivery of the declaration, to the signing of the judgment; but if *declaration* and the *judgment* be of *one term*, then an *imparlance* is not necessary, and the entry will be thus:

As yet of the term of *Easter 36 Geo. 3.* Witness *Lloyd lord Kenyon*, 1796.

Middlesex, { *John Denn* puts in his place *J. K.*
to wit. { his attorney, against *Richard Fenn*,
in a plea of trespass and assault.

The like where declaration is of the same term.

Middlesex,

Middlesex, (fs.) The said *Richard Fenn* puts in his place *J. B.* his attorney, at the suit of the said *John Denn*, in the plea aforesaid.

^a The first day of term.

Middlesex, } Be it remembered, That on ^a *Wednesday* next after fifteen days of *Easter*, in this same term, before our lord the king, at *Westminster*, comes *John Denn*, by *J. K.* his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against *Richard Fenn*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass and assault^b, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, *Middlesex, to wit,* (here enter the declaration *verbatim*, to suit, &c.) then on a new line add the judgment, thus:

^b As the action is.

Judgment.

And the said *Richard*, by *J. B.* his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John*, whereby the said *John* remains therein undefended against the said *Richard*, for which the said *John* ought to recover against the said *Richard*, his damages by occasion of the premises; but because it is unknown to the court of our lord the king, now here, what damages the said *John* hath sustained by reason of the premises aforesaid; it is therefore commanded to the sheriff, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire, &c. (as in the former one).

Entry of a judgment on a warrant of attorney.

Put the term at the top, as in p. 457.

London, (fs.) *A. B.* puts in his place *I. I.* his attorney against *C. D.* in a plea of debt.

London, (fs.) The said *C. D.* puts in his place *T. G.* his attorney, at the suit of the said *A. B.* in the plea aforesaid.

London, (fs.) Be it remembered, that on *Wednesday* next after fifteen days of *Easter* in this same term, before our lord the king at *Westminster*, comes *A. B.* by *I. K.* his attorney, and brings into the said court of our said lord the king, before the king himself, now here, his certain bill against *C. D.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of debt; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words,

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words, to wit, *London*, to wit, *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea, that he render to the said *A. B.* 40*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him. For that whereas the said *C.* on the day of in the year of our Lord 1795, at *London* aforesaid, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, borrowed of the said *A. B.* the said 40*l.* to be paid to the said *A.* when he the said *C.* should be thereto afterwards requested; yet the said *C.* (although often requested, &c.) hath not yet paid the said 40*l.* above demanded, or any part thereof, to the said *A.* but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the said *A.* his damage of 10*l.* and therefore he brings his suit, &c.

The date of
warrant of at-
torney.

And the said *C.* by *T. G.* his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *C.* Therefore it is considered, that the said *A.* recover against the said *C.* his said debt, and also 6*zs.* for his damages, which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges, by him about his suit in this behalf expended, by the court of our lord the king, now here adjudged to the said *A.* by his assent, and the said *C.* in mercy, &c.

Judgment by
nil dicit.

Judgment signed
day of
1795.

Mercy.

If it is upon an old warrant of attorney, the master will tax the costs.

And the said *C.* by *I. K.* his attorney, comes and defends the wrong and injury, when, &c. and the said *A.* prays that the said *C.* may answer to his said declaration: whereupon the said attorney of the said *C.* says, that he is not informed by the said *C.* of any answer to be given for the said *C.* in the premises, nor doth he say any thing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *C.* Therefore it is considered that the said *A.* recover against the said *C.* his said debt, and also (as in the other).

Judgment by non
sum informatus.

And the said *Richard*, by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said

Judgment by
cognovit actionem in case,
where the de-

John,

Defendant acknowledges damages to 20l.

Judgment signed
13th Nov. 1795.

Mercy.

Judgment on
demurrer to the
replication.

Judgment as in
the case of a
nonsuit.

John, nor but that he did undertake and promise, in manner and form as the said *John* hath above thereof complained against him; nor but that the said *John* hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, to 20l. as he the said *John* hath above in his said declaration supposed; and hereupon the said *John* prays that the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him, &c. *Therefore it is considered*, That the said *John* recover against the said *Richard* his damages aforesaid, so by him in form aforesaid acknowledged, and also 10l. for his costs and charges by the court here adjudged to the said *John* by his assent, which damages in the whole amount to 30l. and the said *Richard* in mercy, &c.

To the end of the demurrer book. At which day, before our lord the king, at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and hereupon the premises being seen by the said court here, and fully understood, it appears to the said court here, that the said plea of the said *A.* by way of reply to the said plea of the said *C.* and the matters therein contained, are sufficient in law for the said *A.* to have and maintain his said action thereof against the said *C.* as the said *A.* hath above alledged, for which the said *A.* ought to recover his damages by occasion of the premises; but because it is unknown to the court of our lord the king, now here, what damages the said *A.* hath sustained by the means aforesaid, the sheriffs are commanded (as in the judgment by default).

Enter all the proceedings to the end of the issue, then go on thus: At which day, before our said lord the king at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereon: Therefore let a jury thereupon come before our said lord the king, at *Westminster*, on next, after who neither, &c. the same day is given to the said *A.* there, &c. At which day, before our said lord the king, at *Westminster*, came the said *C.* by his said attorney; and the said *A.* (although solemnly called) came not; and it appearing to the court here, that the said *A.* hath neglected to bring the issue above joined on to be tried, according to the course and practice of the said court; therefore,

therefore, according to the form of the statute in such case made and provided, *It is considered*, by the said court here, that the said *A.* take nothing by his said writ, but that he and his pledges to prosecute, to wit, *John Doe* and *Richard Roe*, be in mercy, &c.; and that the said *A.* go thereof without day. *And it is further considered* by the said court here, that the said *C.* recover against the said *A.* 14l. 10s. for his costs and charges, by him about his defence in this behalf sustained, adjudged by the court here to the said *C.* at his request, according to the form of the statute in that case made and provided; and that the said *C.* have his execution thereof, &c.

To the end of the issue. At which day before our said lord the king, at *Westminster*, came the parties aforesaid, by their attornies aforesaid; and the said *C. D.* hath not here in court the record of the said judgment by him above in his plea aforesaid alledged, but made default of producing the said record. *Therefore it is considered*, that the said *A.* ought to recover his damages by reason of the premises; but because it is unknown to the court here what damages the said *A.* hath sustained by the means aforesaid, the sheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages, &c. (as in a judgment by default).

Entry of a *retraxit* after plea pleaded, and a confession given, or *relicta verifications*.—At which day, before our said lord the king, at *Westminster*, came the parties aforesaid, by their attornies aforesaid; and hereupon the said *C.* by his said attorney, relinquishes his said plea by him above pleaded, and saith, that he cannot deny the said action of the said *A.* nor but that he did undertake and promise, in manner and form as the said *A.* hath above complained against him; nor but that the said *A.* hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to 20l. as he hath therein supposed: and hereupon the said *A.* prays that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him. *Therefore it is considered* that the said *A.* recover against the said *C.* his said damages, above acknowledged to 20l. and also to 5l. for his expences and costs
by

Judgment on a replication of nul tiel record on a rule to produce, in case.

Retraxit in case, and confession.

Enter warrants of attorney, then the memorandum (if by bill) declaration, and plea.

If the defendant do not rejoin, it is considered as an abandonment of plea, and no pleadings are entered.

Non pros for not entering the issue.

by the court of our lord the king now here, adjudged to the said *A.* and by his assent, which said damages in the whole amount to 25*l.* and the said *C.* in mercy, &c.

Judgment for want of *rejoinder* in debt, the plaintiff's entry was a *nil dicit* without the entry of plea and replication: Motion to enter the plea and replication on record. *Per Curiam*—Whenever it becomes necessary to enter *all* the pleadings on the record, as in the instance put of a *noli prosequi* as to part, it may be done; but generally speaking, it can answer no purpose, and is perfectly unnecessary. The master says, that in such cases it is the practice to strike out *all the pleadings*. And in truth, if the defendant *do not rejoin*, it is considered as an *abandonment of the plea*. *Rule abs. Petrie v. Fitzroy, 5 Term Rep. 152.*

Enter the warrants of attorney on the roll, then copy the issue delivered, and go on thus: At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; therefore, as before, let a jury thereupon come before our lord the king at *Westminster*, on next after by whom, &c. and who neither, &c. because as well, &c. The same day is given to the parties aforesaid, at the same place. At which day, before our lord the king at *Westminster*, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereon; whereupon the said *B.* prays the court of our said lord the king here, that the said *A.* may enter the issue joined between the said parties, whereupon the said *A.* is ordered by the court of our said lord the king here, that he enter the said issue joined on next after (the day of the rule) in this same term, on the peril attending the neglect thereof. The same day is given to the said *B.* there, &c. At which day, before our said lord the king at *Westminster*, came the said *B.* by his said attorney, and the said *A.* although solemnly called, came not, but makes default, nor hath he entered the issue joined in the plea aforesaid. Therefore it is considered by the court here, that the said *A.* take nothing by his aforesaid bill, but that he and his pledges to prosecute be amerced, and that the said *B.* may depart the court here without day, for ever dismissed therefrom. It

is also considered by his majesty's said court here, that the said *B.* recover against the said *A.* 8l. for his costs and charges by him about his defence in this behalf expended, adjudged by the said court of our said lord the king now here to the said *B.* and by his assent, according to the form of the statute in such case made and provided, and that the said *B.* have his execution thereof, &c.

Enter the issue on the roll to the end of the last issue joined, then say: And as well to try the said issues above joined between the parties, as to inquire in case a verdict be thereupon given for the said *A.* against the said *W.* what damages the said *A.* hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises; whereof the parties have put themselves upon the judgment of the court, in case judgment shall be thereupon given for the said *A.* against the said *W.* Let a jury thereupon come before our lord the king at *Westminster*, on next after

by whom, &c. and who neither, &c. The same day is given to the said parties there, &c. At which day, before our said lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and hereupon all and singular the premises whereof the parties have put themselves on the judgment of the court, being seen by the court here, and fully understood, and mature deliberation being thereupon had, it appears to the court here, that the plea of the said *A.* by him above pleaded by way of reply to the said plea of the said *W.* by him lastly above pleaded in bar, and the matters therein contained, are sufficient in law for him the said *A.* to have and maintain his said action thereof against the said *W.* Therefore the said *A.* as to that plea, ought to recover his said debt, and his damages by him sustained as aforesaid, against the said *W.* &c. in case a verdict be given upon the said issues for the said *A.* against the said *W.* And as to the trial of those said several issues above joined, between the parties to be tried by the country, and also the inquiry of what damages the said *A.* hath sustained by reason of the detention of the said debt, as for his costs and charges by him laid out about his suit in this behalf, by occasion of the premises whereof the parties have put themselves

Judgment against the defendant upon five issues in debt, and on demurrer to the replication to the sixth plea.

themselves upon the judgment of the court, in case a verdict upon the said issues be given for the said *A.* against the said *W.* the process thereof is continued between the parties aforesaid, by the jury aforesaid, being respited between them, before our said lord the king at *Westminster*, until next after unless

one of his majesty's justices assigned to hold pleas in the said court of our said lord the king here before the king himself, should first come on the day of at the *Guildhall* of the said city, according to the form of the statute in such case made and provided for default of the said jurors, because none of them did appear; at which day, before our said lord the king at *Westminster*, comes the said *A.* by his said attorney, and the said the justice aforesaid, before whom, &c. sent here his record had in these words, to wit: Afterwards, that is to say, on the day and at the place within mentioned, before one of the justices

See the postea
in that title.

Judgment signed
the day of
1796.

of our said lord the king, assigned to hold pleas in the said court of our said lord the king before the king himself, *Roger Kenyon*, Esq. &c. (to the end of the postea on the fifth issue with the assessment of damages). It is therefore considered that the said *A.* recover against the said *W.* his said debt, together with his damages, costs, and charges, by the said jury in form aforesaid assessed: and also 34l. 19s. for his costs and charges by the court of our lord the king now here adjudged to the said *A.* of increase, and by his assent, which damages in the whole amount to 37l. and the said *W.* in mercy, &c.

Mercy.

Judgment for the
defendant on a
demurrer to a
plea.

To the end of the demurrer book. At which day, before our said lord the king at *Westminster*, came the parties aforesaid, by their attorneys aforesaid; whereupon the court of our said lord the king now here, having seen and fully understood all and singular the premises aforesaid, and having maturely deliberated thereupon, it appeared to the court of our said lord the king now here, that the said plea above pleaded by the said *E.* in manner and form aforesaid, and the matter therein contained, are good and sufficient in law to bar the said *H.* from having his said action against the said *E.* Therefore it is considered that the said *H.* take nothing by his said bill, but that he be in mercy of

of the court for his false claim, &c.; and that the said *E.* go thereof without day, &c. And it is further considered, that the said *E.* recover against the said *H.* 14l. 10s. for her costs and charges, laid out by her about her defence in this behalf adjudged to the said *E.* by the court of our said lord the king now here, by her assent, according to the form of the statute in such case made and provided; and that the said *E.* have execution thereof, &c.

To the end of the issue. At which day the jury between the parties aforesaid, in the plea aforesaid, was respited between them, before our said lord the king at *Wenminster*, until next after unless the justices of our said lord the king, assigned to take the assizes in and for the county aforesaid, by form of the statute, &c. should first come on the day of at *H.* in the county aforesaid. And now here, at this day, the said *I. S.* comes by his attorney aforesaid, and the said justices of assize, before whom, &c. sent here their record in these words, (afterwards, to wit, to the end of the *postea*.) Therefore it is considered, that the said *I. M.* take nothing by his said writ, but be in mercy for his false clamor, &c. and that the said *I. S.* go thereof without day, &c. *It is also considered*, that the said *I. S.* recover against the said *I. M.* 17l. for his costs and charges, laid out by him in and about his defence, in this behalf adjudged by the court of our said lord the king now here, by his assent, according to the form of the statute in such case made and provided; and that the said *I. S.* have execution thereof, &c.

Judgment for defendant on plea of non assumpsit.

And the said *C.* by *J. K.* her attorney, comes and defends the wrong and injury, when, &c. and says, that she cannot deny the said action of the said *A.* nor but the said bond is the deed of the said *F.* nor but that she the said *C.* administratrix as aforesaid, detains from the said *A.* the said 100l. in manner and form as the said *A.* hath above complained against her. Therefore it is considered, that the said *A.* recover against the said *C.* administratrix as aforesaid, his said debt, and also 6l. 10s. for his damages, which he hath sustained, as well by occasion of the detaining thereof, as for his costs and charges by him about his suit in this behalf expended, adjudged to the said *A.* by his assent, to be levied of the goods and chattels which were of

Against an administrator in debt by default, p. 403.

the said *F.* at the time of his death in her hands to be administered, if she hath so much thereof in her hands to be administered, and if she hath not so much thereof in her hands to be administered, then the said 6l. 10s. being the damages aforesaid, to be levied of the proper goods and chattels of the said *C.* and the said *C.* in mercy, &c.

The like by confession in case.

And the said *C.* by *J. K.* her attorney, comes and defends the wrong and injury, when, &c. and says, that she cannot deny the said action of the said *A.* nor but that the said *F.* in his life-time did undertake and promise, in manner and form as the said *A.* hath above thereof complained against him, nor but that the said *A.* hath sustained damages by reason of the not performing the said promises and undertakings in the said declaration mentioned, to 25l. as the said *A.* hath above supposed: And upon this the said *A.* prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him, &c. Therefore it is considered, that the said *A.* recover against the said *C.* administratrix as aforesaid, his said damages so above acknowledged, to be levied of the goods and chattels which were of the said *F.* at the time of his death, in her hands to be administered; and if she has not so much in her hands to be administered, then 6l. being for the costs and charges laid out by him about his suit, by the court of our lord the king now here adjudged, to the said *A.* with his assent, to be levied of the proper goods and chattels of the said *C.* and the said *F.* in mercy, &c.

Judgment of assets in futuro upon a plea of plene administravit.

Enter the declaration and plea of *plene administravit*; and hereupon the said *A.* inasmuch as the said *D.* does not deny the action of the said *A.* but admits the same to be true; and inasmuch as the said *A.* cannot deny, but that she the said *D.* hath not any goods or chattels which were of the said *J.* at the time of his death in her hands to be administered, in manner and form as the said *D.* hath above in her said plea in that behalf alledged, prays judgment, and his damages, on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be levied of the goods and chattels which were of the said *J.* at the time of his death, when, after final judgment in this respect, they shall come to the hands of

of the said *D.* to be administered. Therefore it is considered, that the said *A.* recover against the said *D.* his damages by him sustained by reason of the premises aforesaid to be so levied; but because it is unknown to the court of our lord the king now here, what damages the said *A.* hath sustained by reason of the premises aforesaid; therefore the sheriff is commanded, that by the oath of twelve honest and lawful men of his bailiwick, he diligently inquire what damages the said *A.* hath sustained by reason of the premises aforesaid; and that he send the inquisition which he shall thereupon take to our lord the king at *Westminster*, on next after under his seal, and the

seals of those by whose oath he shall take the said inquisition, together with the writ of our lord the king to him thereupon directed. The same day is given to the parties aforesaid at the same place. At which day, before our lord the king at *Westminster*, came the said *A.* by his said attorney; and the sheriff, to wit, *W. K.* and *L. M.* esquires, sheriff of the said county, returned a certain inquisition by him taken at, &c. on the day of in the 36th year of the reign

of our lord the now king, by the oath of twelve good and lawful men of his county, by which it is found, that the said *A.* hath sustained damages by reason of the premises to 50*l.* Therefore it is considered that the said *A.* recover against the said *D.* the said 50*l.* for his damages aforesaid by the inquisition aforesaid above found, to be levied of the goods and chattels which were of the said *J.* at the time of his death, when such goods and chattels shall hereafter come to the hands of the said *D.* to be administered. And the said *D.* in mercy, &c. Although there are no costs *de incremento* in this case; *quære*, if the sheriff does not return costs on his inquisition? if so, they should be added as in other judgments in case.

This judgment is first signed on a treble penny stamp paper, and notice must be given in the usual way to execute the inquiry, and the plaintiff's debt must be proved before the sheriff; but if the action is in debt, sign it on a double half-crown stamp paper.

And for that the said *Mary* cannot deny but that the said *John* and *Nicholas* have not, nor on the day of exhibiting the bill of the said *Mary*, or at any time afterwards,

There are no costs. Ball & al. v. De Champs & al. T. 24 Geo. 3.

How to sign judgment.

Judgment of assizes in futuro, in debt.

wards, had any goods or chattels which were of the said *Richard*, at the time of his death, in the hands of the said *John* and *Nicholas*, to be administered, sufficient to satisfy the said *Mary* the said debt; the said *Mary* prays judgment, and her said debt to be adjudged to her, to be levied of the goods and chattels which were of the said *Richard*, at the time of his death, and which hereafter shall come to the hands of the said *John* and *Nicholas* to be administered. Therefore it is considered, that the said *Mary* recover against the said *John* and *Nicholas* her said debt, to be levied of the goods and chattels which were of the said *Richard* at the time of his death, and which hereafter shall come to the hands of the said *John* and *Nicholas* to be administered; and the said *John* and *Nicholas* in mercy, &c.

Insolvent debtor.

In an action against an insolvent debtor, or fugitive, whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects. 1 Term Rep. 80.

Scire Facias to revive.

Of reviving Judgments by Scire Facias.

After a Year and Day.

ALL writs of execution must be sued out within a year and a day after final judgment signed; otherwise the court concludes, *primâ facie*, that the judgment is satisfied and extinct: yet however it will grant a *scire facias*, in pursuance of the statute of *Westm. 13 Ed. 1. c. 45.* for the defendant to shew cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to alledge, in order to shew why process of execution should not be issued; or the plaintiff may still bring an action of debt founded on this dormant judgment, which was the only method of revival allowed by the common law. *Co. Lit. 290. 2 Inst. 469.* But if once an execution is sued within the year, and it be not executed, it may be continued on the roll from term to term, and there needs no *sci. fa.* 2 *Inst. 471. 2 Lill. Pract. Reg. 608.*

A *scire*

A *scire facias* to revive a judgment entered on a bond securing an annuity granted before the 17 Geo. 3. c. 26. is an action within that statute; and therefore a memorial of the annuity must be inrolled before brought, and execution on a *sci fa.* was set aside, the consideration of the memorial not being truly stated. It expressed 1000l. money lent; whereas 700l. was only lent, and a *respondentia* bond of 271l. given, also a deduction of 29l. for charges. *Fenner v. Evans*, 2 Term Rep. 267.

A *sci. fa.* to revive on a judgment secured to pay an annuity is an action.

A *scire facias* is a judicial, not an original writ, but is framed out of the record; and it is in the nature of an action, for a release of actions or executions discharges it. *Co. Lit.* 290. b.

Judicial writ.

It is a *judicial writ* in the nature of an original. *Judicial*, inasmuch as it is founded on a judgment, or other matter of record; and in the *nature of an original*, since *similar proceedings may be had* thereon as in common actions: And it hath been held in a variety of cases, that it is an action. *Fenner v. Evans*, 1 Term Rep. 267. 2 Term Rep. 45.

In nature of an original.

An execution had after a year and day without *sci. fa.* is not void, but voidable. 3 Lev. 140. *Salk.* 273. pl. 4.

Void or voidable.

If there has been no *ca. sa.*, *fi. fa.*, *elegit*, or *hab. fac. possessionem* sued out within the year and day, then in order to revive the judgment, and take out execution, you must sue out a *scire facias* into the county where the original action was brought, the court supposing the defendant to reside in the same county. *Salk.* 258. 600. *Comb.* 250. *N. on R. E.* 5 Geo. 2.

Sci. fa. must be sued out in the county where the original action was.

This *sci. fa.* was intended to prevent a surprise upon the defendant after the year and day elapsed; but where he effects the delay, by bringing a writ of error, though above a year and day, yet execution may issue without a *sci. fa.* *Cro. fac.* 364. So if he be non-suited, or discontinues in error, though the year was expired before error brought. *Ibid.*

No *sci. fa.* necessary, if defendant has made the delay.

If the plaintiff has judgment with a *cesset executio*, or stay of execution for a year, he may, after the year, take out execution *without a scire facias*, because the delay is by consent of parties, and in favor of the defendant; and the indulgence of the plaintiff ought not to be turned to his prejudice. But if the plaintiff do not take out execution within a year after the *cesset*

Stay of execution.

executio is determined, a *sci. fa.* must be sued out. *Mod. Caf.* 288.

If an injunction,
contra 1 Str.
301.

An execution was taken out without a *sci. fa.* where the defendant had made delays by bills in chancery for injunctions, and by obtaining time for payment, which the court held regular, and discharged the rule obtained for setting the proceedings aside with costs. 2 *Burr.* 660. *Mitchell v. Cuc.*

Computation of
the year.

The year is to be computed from the day of signing judgment, not by the number of terms. *Mod. Caf.* 288.

If execution not
returned, or not
filed, continu-
ances cannot be
entered.

If *execution* is not returned by the sheriff, or not filed, continuances on it cannot be entered on the roll; and if they are, and thereupon a *ca. fa.* is issued after the year, without *sci. fa.* defendant shall be discharged out of custody, and plaintiff pay costs. Vide 2 *Wils.* 82. *Barnes* 213.

If error brought.

If error be brought, though the party be hung up never so many years, yet there may be execution sued out immediately upon affirmance without a *sci. fa.* 2 *Inst.* 471. 5 *Co.* 78. 6 *Mod.* 288. 1 *Str.* 301. *Winter v. Lightbound.* 1 *Salk.* 322.

If Plaintiff or Defendant die after Final Judgment, and before Execution.

In no case where
parties are
changed, ought
execution to go
without a *sci. fa.*

It is held that in no case where the parties to the judgment are changed, ought execution to be sued by any other without a *scire facias*; therefore, if the plaintiff dies before execution awarded, the execution cannot be sued out in his name before *sci. fa.* 2 *Ld. Ray.* 768. *Regina v. Ford.* But if execution is executed before death of plaintiff, it is good, for the plaintiff's death does not alter the execution. Also, upon the death of the defendant, after final judgment recovered against him, no execution can issue against his executors or administrators, without a *scire facias*, to shew cause why the plaintiff should not have execution against the goods, &c. of their testator. *Lutw.* 1273. To this the executors and administrators may appear and plead such matter as they have to alledge, why execution should not issue: If not, judgment will be signed by default, and execution may issue thereon against the goods, &c. of their testator, in their hands. But if the defendant die in the vacation, and the judgment is not above a year and a day past, the plaintiff

If defendant die
after final judg-
ment.

plaintiff may sign judgment, but not take out execution without a *sci. fa.* 6 Term Rep. 368.

If one recover against a *feme sole*, and she is married within the year and day, a *sci. fa.* must go against the husband. *Wood's Inst.* 670. *Lut.* 1273.

If recovery against a *feme sole*.

The husband cannot have execution for the costs on a plea of coverture found for the defendant without a *sci. fa.* it being a maxim, that a person not a party to the record, cannot be benefited or charged with the process without a *sci. fa.* *Dougl.* 637. *Wortley v. Rayner.*

The husband cannot have execution on a plea of coverture.

It is necessary in case the plaintiff becomes nonsuit. Necessary on a nonsuit.

If an executor or administrator obtains judgment, and dies before execution, an administrator *de bonis non*, &c. shall have a *sci. fa.* upon such judgment. *Stat.* 17 Car. 2. c. 8. *Jon.* 214. 1 *Roll* 890. *Cro. Car.* 167.

If executor die, adm. de bonis non may have it.

If a judgment be against two, the *sci. fa.* must be against both. 2 *Salk* 298.

If against two.

If a writ of execution be once sued out, returned, filed, and entered on the roll, it may be continued until you sue out and execute a new one, and be as effectual as if new writs were issued out every term, *Str.* 100. *Aires v. Hardress.*

If execution once sued out, need not sue out scire facias.

When may or not be sued without Motion.

The writ of *scire facias* may be sued out of course at any time within seven years of the judgment being signed, but after that, and under ten years, there must be a motion for leave to sue it out at the side bar, which is done by attending at *Westminster* before the judges go into court. The clerk of the rules draws up the rule in the evening, 6s.; there is no occasion to serve it on defendant or his attorney. *Salk.* 598. *Comb.* 356. 2 *Lill. P. R.* 612.

May be sued out of course within seven years, but afterwards a motion must be made at side bar.

If it be above ten years standing, the plaintiff must move the court on an affidavit of the debt being due, the judgment unsatisfied, and that the defendant is living. *Clerk's Instr.* 159. *Style* 495. If it be at the suit of an executor or administrator, it is only a hand motion, if judgment be not above ten years old.

If above ten years.

If after such motion the judgment is revived, and then the defendant dies before execution, the plaintiff must sue out a new *sci. fa.* and may have it without motion; When new *sci. fa.*

motion; for the judgment was revived before. *Salk.* 598.

Execution cannot be sued out after judgment revived, if above a year and a day.

When an alias requisite.

Execution cannot be sued out on a judgment revived by *scire facias* after the year and day, and no execution issued, but must be again revived.

If upon a *scire facias*, the sheriff returns *scire feci*, and defendant makes default in appearance, there shall be judgment against him. But in all cases when the sheriff returns *nihil*, another *scire facias* shall be awarded. *2 Mod.* 227. *2 Inst.* 472. And if he does not appear, there shall be judgment against him. *Dy.* 168.

Scire facias to be left four days before return if notice is given.

If a nihil, some time before return.

Alias four days.

Sheriff to indorse it.

To lie in office last four days.

No alias to issue until the first writ be returnable.

Each to have seven days between teste and return by bill.

It is ordered, that every writ of *scire facias*, (of which notice shall be given to the defendant,) shall be delivered to, or left in the office of the sheriff to whom directed, *four days before the return* of such writ, *exclusive of the day* on which such writ is returnable: And that every first writ of *scire facias*, on which a nihil shall be returned, shall be delivered to, or left in the office of the sheriff, *some time before the return* of such writ: And that every writ of *alias scire facias* shall be delivered to, or left in the office of the sheriff, *four days exclusive before the return* of such writ; and every sheriff shall write or indorse on such writ, the day of the month in which the same is delivered to him, or left in his office. *R. E.* 5 *Geo.* 2.

The rule is that the *alias sci. fa.* shall lie in the office the *last four days before* the return; and the reason is that the sheriff may (if possible) serve it. *Per Cur.* *Forty v. Hermer*, 4 *Term Rep.* 583.

It is ordered, that upon issuing any writ of *scire facias*, upon any suit here depending, *no writ of alias scire facias* shall thereupon issue, until the *first writ of scire facias be returnable*: If sued contrary to this rule, such *alias* shall be void. *R. F.* 8 *W.* 3.

If there be two *sci. fa.*'s there must be fifteen days between the *teste* of the *first* and *return* of the *second*, without any regard to the number of days between the *teste* and *return* of each. *Str.* 1139. It cannot be tested on a Sunday. *Dy.* 168. *Mod. Cas. Law and Equity*, 227. 305. *Salk.* 599. And every writ of *alias* shall bear *teste*, the day of the return of the first. *Salk.* 599. 6 *Mod.* 86.

The court in *Easter* term 1792 held, that *four days exclusive* are sufficient between the *teste* and *return* of the *sci. fa.* where *one sci. fa. only issues*, and proceedings are by bill. *Bell v. Jackson*, 4 Term Rep. 663. *contra. N. on R. E.* 5 Geo. 2. 2 Jon. 228. Com. 53. Salk. 599. Skin. 633. And *Mod. Cas. L. & Eq.* 355. proceedings were staid, because *four days only between teste and return.*

If only one *sci. fa.* by bill, four days between teste and return.

Every *sci. fa.* by original, ought to have *fifteen days inclusive* between the *teste* and *return*, unless helped by *stat.* 16 Car. 1. c. 6. and 13 Car. 2. c. 2. *N. on R.* 8 W. 3.

By original, 15 days.

Motion to stay proceedings on *sci. fa.* because it was not served till the day before the return. *Sed per Curiam*, If it lays four days in the office, that is all which is required; the summons may be made any time before the court is up, on the day of the return. *Obrian v. Frazier*, 1 Str. 644. *Bland v. Perry*, so ruled again in *T. T.* 4 Geo. 2. on great debate. *Vide* 3 Burr. 1360. *Hunt v. Cox*. *Barnard. K. B.* 344.

When may summon.

The general practice upon two *sci. fa.*'s is, to leave the first *one day before* the return for a *nihil*, which is thought to be a sufficient time within the rule of *E.* 5 Geo. 2.

First *sci. fa.* left one day before return, will do.

To revive a judgment it is seldom that the party is warned by the sheriff; but if he is, the *scire facias* must be left at the sheriff's office, and a summons taken thereon, directed to an officer; pay 2s. 4d. who will serve it.

If returned *sci. feci.*

To be ingrossed on a 3s. 6d. stamp parchment, which take to Messrs. *Provost* and *Webb*, with a *præcipe*, who will sign it, pay 1s. 8d. seal 7d. If left for a return of *nihil*, take it to the sheriff's office, pay 1s. for each defendant; upon the *return day*, sue out an *alias*, sign and seal it as before, and leave it at the sheriff's office.

How to be sued out.

A *sci. fa.* ought to be as short as possible, because it is of the nature of writs to set forth things very briefly; and a writ is therefore called a *brief*, from the Latin word *breve*, which signifies short or compendious. 2 Lill. 609.

To be short.

Middlesex. Sci. fa. to revive for A. B. against C. F. for 1000l. debt, and 63l. damages, returnable on, &c.

Præcipe.

J. K. attorney.

George

Scire facias in
debt.

George the third, by the grace of God of *Great Britain, France, and Ireland*, king, defender of the faith, &c. to the sheriff of *Middlesex*, greeting: Whereas *John Denn*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Charles Fenn* 1000*l.* for a debt, and also 63*l.* for his damages which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Charles* is convicted, as appears to us of record; and now on the behalf of the said *John* we have been informed, that although judgment be thereupon given, yet execution for the said debt and damages still remains to be made to him; whereupon the said *John* hath humbly besought us to provide him a proper remedy in this behalf; and we being desirous that what is right and just should be done on this occasion, command you^a, that by good and lawful men of your bailiwick, you cause it to be made known to the said *Charles*, that he be before us, at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, to shew if he has, or knows of any thing to say for himself, why the said *John* ought not to have his execution against him for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do: and further to do and receive what our said court before us shall then and there consider of him in this behalf; and have you there then the names of those by whom you shall so make known to him, and this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the 12th day of *February*, in the 36th year of our reign.
Mansfield and Way.

^a If an alias,
say, as before we
have commanded
you.

The like in case.

George the third, &c. To the sheriff of *Kent*, greeting: Whereas *John Buttle*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Charles Waters* 50*l.* for his damages, which he had sustained, as well by occasion of the not performing certain promises and undertakings made by the said *Charles* to the said *John*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Charles* is convicted, as appears to us of record, and now on the behalf of the said *John*, we have been

been informed, &c. (as in the other precedent, only leave the word "debt" out).

For his damages which he had sustained, as well by means of a certain trespass committed by the said C. at B. in your county, as for his costs, &c. The like in trespass.

For his damages which he had sustained, as well by occasion of a certain trespass and assault made by the said C. on the said F. at B. in your county. The like in trespass and assault.

For his damages which he had sustained, by reason of a certain breach of covenant made by the said C. to the said A. as for his costs, &c. If in covenant,

Sci. Fa. for and against Executors and Administrators.

George, &c. Whereas A. B. lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against C. D. 40l. for his damages, which he had sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him laid out about his suit in that behalf, whereof the said C. is convicted, as appears to us of record, and now on the behalf of the said A. we have received information in our court before us, that although judgment be thereupon given, yet execution of the said damages still remains to be made to him; and the said C. D. is since dead intestate, and administration of all and singular the goods and chattels, rights and credits, which were of the said C. at the time of his death, was committed and granted to E. F. the widow and relict of the said C. in due form of law, as we have received information from the said A.; whereupon the said A. hath besought us to provide him a proper remedy in this particular, and we being willing, that what is just and right should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said E. administratrix as aforesaid, that she be before us at *Westminster*, on next after to shew if she has or knows of any thing to say for herself, why the said A. ought not to have his execution against her, for the damages aforesaid, to be levied of the goods and chattels which were of the said C. at the time of his death, in her hands to be administered, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive (as in the former one). Against an administratrix in case.

George,

The like against
an executor.

George, &c. to the end of the words "yet execution of the damages still remains to be made to him," then say: And whereas the said *C. D.* is since dead, having first duly made his last will and testament, and appointed *E. F.* executor thereof, as we have been informed in our said court before us; whereupon the said *A.* hath besought us to provide him a proper remedy, &c. as in the other; only say *executrix*, instead of *administratrix*.

Three executors
and two infants.

Three executors, two of whom were infants, he of full age proved, and he alone brings a *sci. fa.* sets forth the truth, and obtains judgment. Error brought and assigned, that all ought to have joined—held no error; for the others cannot prove the will during their nonage, and the judgment affirmed; for the execution shall not be delayed till the infants come of full age. *Hatton v. Mascall*, 1 Lev. 181. 2 Saund. 212, 213.

Goods of the testator, in the hands of his executor, cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman*, 4 Term Rep. 610.

The like for an
executor.

George the third, &c. Whereas *A. B.* lately in our court before us (as in the first *sci. fa.* to "record,") yet execution of the said judgment still remains to be made, and the said *A.* is since dead, as we have received information from *C. G.* executor of the last will and testament of the said *A.* and because we are willing (as in the former one) to shew if he hath, or knoweth of any thing to say for himself, why the said *C. G.* executor, as aforesaid, ought not to have execution against him for the damages aforesaid, according, &c.

The like for an
administrator.

And the said *A.* is since dead, as we have received information from *E.* administrator of all and singular the goods and chattels, rights and credits of the said *C. D.* deceased, and because we are willing, &c.

How to proceed to Judgment.

How to proceed
after sheriff's
return.

When the sheriff has returned upon the first *sci. fa. scire feci*, or a *nihil* upon the first, and also *nihil* on the alias; on the return day of the alias, or first *sci. fa.* (if only one is sued out, and a *sci. feci* returned on it), give a rule at the clerk of the rules, which is wrote on a plain piece of paper thus, "*A. B. against C. D. rule on sci. fa.*" pay 1s. 10d. which expires four days ex-
clusive

classe of the day it is given; and if the defendant does not appear, execution may be taken out after the *entry* made of the *sci. fa.* on the roll, with the clerk of the judgments.

Get *sci. fa.* from the sheriff's office returned, then enter on a roll as far as the sum recovered, take same to the clerk of the judgments, and he marks the roll and the two *sci. fa.'s*, pay 2s. for the entry, which is as follows:

How to enter judgment by default.

Middlesex, } Our lord the king hath sent to his sheriff
to wit, } of *Middlesex*, his writ closed in these words, to wit, *George* the third, (to the end of the first *sci. fa.*) *Mansfield* and *Way*. Then on a new line—At which day before our lord the king, at *Westminster*, came the said *A.* in his own proper person, and the sheriff, to wit, and

The entry of two *sci. fa.'s*.

esquire, sheriff of the said county, returned to us, that the said *C.* had not any thing in his bailiwick, where, or by which he could give him notice, as by the said writ he was commanded, or was the said *C.* found in the same; therefore as before it was commanded to the said sheriff, that by honest and lawful men of his bailiwick, he make known to the said *C.* that he before us, at *Westminster*, on^a next after

^a The return day of the alias.

to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said *A.* there, &c. at which day before our said lord the king at *Westminster*, came the said *A.* in his proper person, and the sheriff as before returned, that the said *C.* had not any thing in his bailiwick, where, or by which he could give him notice, as by the said writ he was commanded, or was the said *C.* found in the same; and the said *C.* although solemnly called, came not, but made default. Therefore it is considered, that the said *A.* have his execution against the said *C.* for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said *C.* &c.

Judgment by default.

If there be a *scire facias* of one term, and the second *sci. fa.* returnable the next term; enter the first on the roll, with an award of the second as far as the return day; then docket it, otherwise you will have a *post terminum* to pay.

If *sci. fa.* of different terms,

London, (s.) Our lord the king hath sent to his sheriffs of *London* his writ, closed in these words, to wit,

The entry of one *sci. fa.* in *London*.

wit, George the third, &c. (to the end of the *scire facias*, *Mansfield and Way*); at which day, before our lord the king at *Westminster*, came the said *A.* in his own proper person, and the sheriffs, to wit,

and sheriffs of the said city, returned to us, that they had made known to the said *C.* that he be before the king on the day and at the place in the said writ mentioned, as by the said writ they were commanded. The same day is given to the said *A.* there, &c. And the said *C.* although solemnly called, came not, but made default. Therefore it is considered, that the said *A.* have his execution against the said *C.* for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, by the default of the said *C.* &c.

Judgment.

Of the Appearance and Declaration.

Appearance.

If the defendant appears to the *scire facias*, by bill, he does it by a note in writing delivered to the plaintiff's attorney, before the end of the four days, after the rule on the *sci. fa.* is given, thus, "A. B. against C. D. "I appear for the defendant upon the writ of *scire facias* issued in this cause.

"Yours, J. K. attorney."

A memorandum on a 2s. 6d. stamp I take to be necessary, and to be filed with Messrs. *Provoost and Webb*. *Quære*, If not actually necessary for plaintiff's attorney to file one?

If appearance.

If the defendant does appear, then declare against him in this form:

Easter term, 36th George the third.

Declaration on a *scire facias*.

Middlesex, (ss.) Our lord the king sent to his sheriff of *Middlesex*, his writ closed in these words, to wit, George the third, (to the end of the entry on the roll, as far as the return of the sheriff on the second *sci. fa.* if there are two), then say, *At which day before our said lord the king, at Westminster, came the said C. by J. B. his attorney, and thereupon the said A. prays that execution may be adjudged to him, of the debt and damages aforesaid, according to the force, form, and effect of the said recovery, &c.*

What is a sufficient certainty in a *sci. fa.*

A declaration on a *scire facias* by the assignees of a bankrupt, stating, "that he became a bankrupt within "the meaning of the statute, &c. and that his goods "and effects were afterwards in due manner assigned

"to the plaintiffs," is sufficiently certain, without alledging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter assignees of Beyer v. Kretchman*, 2 Term Rep. 45.

A declaration on a *sci. fa.* returnable the last return, may be entitled of the same term generally. Vide 3 Wils. 154. *Ward v. Gansell*.

To be engrossed on a treble penny paper, charge 8d. per sheet drawing, and 4d. for the copy, besides stamps, and all the proceedings are to be delivered to the attorney for the plaintiff, by bill as well as original, who makes up the issue or paper book; a rule to plead is to be given, and plea demanded, and all proceedings are the same as in other cases. If there be an issue, you begin with declaration, there being no memorandum in this case. Proceedings.

If the *sci. fa.* is bad, it cannot be amended, but you must move to quash it, which is done by counsel on motion in the first instance, see 10s. 6d. rule 5s. Str. 401. *Hillier v. Frost*. Sci. fa. cannot be amended.

If final judgment be obtained against B. by A. who afterwards dies, his executor must take probate of his will, so as to recover the money, at Doctors Commons, for the money is assets at Westminster, and the executor cannot maintain the *sci. fa.* without such probate. 6 Mod. 131. So if administration is granted. 7 Mod. 15. *Carlisle v. Greenwood*. Where probate ought to be taken after final judgment, and before revivor.

A *scire facias* to revive a former judgment, is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error, in that former action, such agreement shall bind his executors upon the *scire facias* being brought against them. 1 Term Rep. 388. *Wright v. Nutt*. How far it is a continuation of the former action.

Baron and feme brought a *sci. fa.* upon a judgment recovered by the feme *dum sola*. After execution awarded, the feme dies, it was held, it survived to the husband. 3 Mod. 186. *Salk. 116*. Sci. fa. by baron and feme on a judgment recovered by feme whilst sol., if after execution

awarded, she die, it survives to the husband.

Judgment was recovered against a feme sole, who after married; a *sci. fa.* was sued out against the husband and wife, and judgment against them; before execution executed, the wife died, and after her death, a new *sci. fa.* was issued against the husband, and he was held chargeable; but he was not liable upon the first judgment. *Salk. 117*. Judgment against a feme sole, who after married; before execution, wife died, the husband is chargeable.

Judgment

In ejectment execution cannot be sued out after the year and day without sci. fa.

Judgment in ejectment, and after a year and a day, there was a *ha. fac. poss.* without bringing a *sci. fa.* and adjudged that it ought to be brought as well against the *tertenants* as against the defendants. *Withers v. Harris*, 3 Salk. 319. pl. 1.

Proceedings by Original.

If sci. fa. be by original.

If the proceedings are by original, the master says, the *scire facias* after judgment is to be made out by the attorney, and signed by Messrs. *Provost* and *Webb*; pay 1s. 8d. and 7d. seal. and not the filazer.

Sci. fa. by original.

George the third, &c. to the sheriffs of *London*, greeting: Whereas *A. B.* lately in our court before us at *Westminster*, by our writ, and by the judgment of the same court, recovered, &c. (as in one by bill, to the word behalf), and have there the names of those by whom, &c. Witness, &c. The return must be a general one; as, on the morrow of *All Souls*, wherefoever we shall then be in *England*. *Mansfield* and *Way*. And there must be fifteen days between the *teste* and return of each writ. A rule may be given on the return day of the second, with the clerk of the rules; when expired, sign judgment; but then it cannot be signed until four days after the quarto die post of the return of the second sci. fa. if there be two; if not, four days after the quarto die post of the first, if returned *scire feci*.

As to teste and return.

A *scire facias* was tested, making both the *teste* and return inclusive of the fifteen days, and held well. Salk. 599. 2 Jones 228.

If Plaintiff or Defendant die after Interlocutory, and before Final Judgment, how to proceed.

Proceedings by an executor or administrator after interlocutory judgment.

At common law, the death of either party abated the suit; but now it is otherwise by the statute 8 & 9 W. 3. c. 10. s. 6. which enacts, that if any plaintiff die after interlocutory and before final judgment, the action shall not abate, if it might originally be prosecuted by the executors, &c. of such plaintiff; and if the defendant die after interlocutory and before final judgment, the action shall not abate, if it might originally be prosecuted against the executors, &c. of such defendant; and the plaintiff, or, if he be dead after such interlocutory judgment, his executors, &c. may have a *scire facias* against the defendant, if living, after such judgment;

ment; or if he died after, then against his executors, &c. to shew cause why the damages in such action should not be assessed and recovered.

If the plaintiff dies after interlocutory judgment signed, and before inquiry, make out the following *sci. fa.* and if not returned *scire feci*, make out an *alias*, and proceed to judgment in the same manner as before stated.

How to proceed if plaintiff dies.

George the third, &c. To the sheriffs of London, greeting: Whereas S. J. lately in our court before us, at *Westminster*, by bill without our writ, impleaded J. H. being in the custody of the marshal of our *Marshalsea* before us; For that whereas, (here recite the whole declaration) to the said S. J. his damage of 50l. as he said, and thereupon he brought suit, &c. and such were the proceedings in our said court before us at *Westminster*, that afterwards, to wit, in *Hilary* term last past, it was considered by our said court before us, that the said S. ought to recover his damages by occasion of the premises; but because it was unknown to our said court before us, what damages the said S. had sustained by means of the premises aforesaid, we commanded you, that by the oaths of twelve good and lawful men of your bailiwick, you should diligently inquire what damages the said S. had sustained, as well by occasion of the premises, as for his costs and charges by him laid out about his suit in that behalf; and that you should send the inquisition, which you should thereupon take, to us at *Westminster*, at a certain day now past, under your seal, and the seals of those, by whose oath you should take that inquisition, together with our writ to you for that purpose directed, as by the record and proceedings thereof, remaining in our said court before us, at *Westminster* aforesaid, more fully and at large appears; yet inquisition of the said damages still remains to be made; and the said S. after interlocutory judgment had been given in form aforesaid, and before the return of our said writ of inquiry by us to you sent as aforesaid, for the purpose aforesaid, died^a, having first duly made his last will and testament in writing, and appointed J. B. sole executor thereof, upon whose death, the said J. B. duly proved the said will, in the prerogative court of the Archbishop of *Canterbury*, in due form of law, and took upon himself the burthen of the execution thereof, as

Sci. fa. by an executor after an interlocutory judgment, and before inquiry executed.

To be signed and sealed, with Messrs. Provost and Webb.

^a Intestate and administration of all and singular the goods, chattels, rights, and credits, which were of the said

S. at the time of his death, was by Thomas, by Divine Providence Archbishop of Canterbury, primate of all England, and metropolitan, committed and granted to J. B. to wit, at

as by the said J. B. we are given to understand, &c.

1 Will. 135.

by the said J. B. we are given to understand, and be informed, wherefore the said J. B. executor as aforesaid, hath humbly besought us to provide him a proper remedy in this behalf; and we being willing, that what is just and right should be done, command you that, by good and lawful men of your bailiwick, you make known to the said J. H. that he be before us at Westminster, on next after to shew if any thing he has or knows to say for himself, why the damages in the said action ought not to be assessed and recovered by the said J. B. executor as aforesaid, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further, to do and receive what our said court, before us, shall then and there consider of him in this behalf; and have there then the names of them by whom you shall so make known to him, and this writ. Witness, &c.

Mansfield and Way.

Of Defendant's Appearance.

The defendant appears by delivering a note in writing to plaintiff's attorney, and a memorandum or minute on a 2s. 6d. stamp must be filed, and the proceedings are not in this case to be filed with the clerk of the papers, but delivered to the attorney on each side.

Declaration.

London, (ss.) Our lord the king sent to his sheriffs of London his writ, closed in these words, to wit, (*here set forth the two sci. fa.'s as far as the return of the second, exactly as on the roll*), then say: And the said J. being solemnly called, comes by J. T. his attorney, and thereupon the said J. B. executor as aforesaid, prays that the damages in the said action may be assessed, and be recovered by him the said J. according to the form of the statute in that case made and provided; and the said J. brings into court here the letters testamentary of the said S. J. whereby it fully appears to the court here, that the said J. B. is executor of the last will and testament of the said S. and hath the administration thereof, &c.

If no appearance, how to sign judgment.

If the defendant does not plead after the rule is expired, then sign judgment as in common cases on a double 2s. 6d. stamp, and give notice of executing the writ of inquiry, and proceed to final judgment as in other cases. *Vide* the form of the writ in Lilly's Entries 609.

After

After final judgment is obtained on the inquiry, enter the same on the *scire facias* roll; therefore supposing it to be carried in, take the inquisition to *Westminster* for that purpose, pay 2s. 6d. the award of the inquiry, inquisition, and final judgment is to be added.

How to make
the entry after
final judgment.

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. B.* lately in our court before us at *Westminster*, by bill without our writ, impleaded *C. D.* being in the custody of the marshal of our *Marshe* before us: For that whereas (here go to the end of the declaration) to the damage of the said *A. B.* of 20l. as he said, and thereupon he brought suit, &c. and such proceedings were thereupon had in our said court before us at *Westminster*, that afterwards, to wit, in *Hilary* term last past, it was considered by our said court before us, that the said *A. B.* ought to recover his damages by occasion of the premises; but because it was unknown to our said court before us, what damages the said *A. B.* had sustained by occasion of the premises aforesaid; we therefore commanded you, that by the oaths of twelve good and lawful men of your bailiwick, you should diligently inquire what damages the said *A. B.* had sustained, as well by occasion of the said premises, as for his costs and charges by him about his suit in that behalf expended, and that you should send the inquisition which you should thereupon take to us at *Westminster*, on next after under your seal, and the seals of those by whose oath you should take the said inquisition, together with that writ. The same day was given to the said *A. B.* &c. as by the record and proceedings thereof, remaining in our court before us at *Westminster*, manifestly appears; and the said *C. D.* after interlocutory judgment had been given in form aforesaid, and before any inquisition taken on our said writ of inquiry by us to you sent, for the purpose aforesaid, died intestate, and administration of all and singular the goods, chattels, and credits of the said *C. D.* hath been granted to *M. D.* the widow and relict of the said *C. D.* as we have been given to understand and be informed; and because we being willing that those things, which in our said court before us should be duly executed, we command you, that by good and lawful men of your bailiwick, you make known to the said *M. D.* administratrix as aforesaid, that she be before us at *Westminster*, on

Scire facias
against an admin-
istrator of the
defendant, dying
after interlocu-
tory judgment.

next after to shew if any thing she has, or knows, to say for herself, why the said damages in the said action ought not to be assessed, and by the said *A. B.* recovered, according to the form and effect of the statute in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said court before us shall then and there consider, &c. (as in the other). Vide *Salk.* 315.

Proceedings against Bail.

The bail stipulate by their recognizance in this triple alternative, *That the defendant shall, if condemned in the action, satisfy the plaintiff his debt and costs; or, that he shall surrender himself a prisoner; or, that they will pay it for him:* and when judgment is obtained, they stand liable to perform this contract, and may be compelled so to do; but before any immediate proceeding can be had against them, a *capias ad satisfaciendum* must be sued out against the defendant, *into the county where the original action is laid*, and left for a return of *non est inventus* by the sheriff of that county in his office, four days exclusive of the return day; the bail not being bound to render the principal, until they know what execution the plaintiff chooses to take out. 3 *Burr.* 1360. *Salk.* 559. No execution but a *ca. sa.* has effect to fix the bail, all others aiming at satisfaction by a seizure of the defendant's property, whereas this writ amounts to a demand on him to surrender himself a prisoner, which if not done by the return thereof, the bail (who may, on their own authority, take the defendant into custody, and by surrendering him, discharge themselves) having, it is presumed, made their election to perform the condition of their recognizance. The recognizance being thus forfeited, the plaintiff may either bring his action of debt thereon, or proceed by *scire facias* against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages.

How to proceed.

But before a *sci. fa.* is sued out, or action commenced, it is necessary to make an entry of the recognizance with the clerk of the judgments; and the roll ought to be docketed, and carried in: the form of which see afterwards.

It was held in *E. T.* 35 *Geo.* 3. that the bail were not discharged by the principal's giving a *cognovit*; and refused to grant a rule to enter an *exoneretur* on the bail-piece. *Hodgson v. Nugent*, 6 *Term Rep.* 277.

Bail not discharged by a *cognovit* by defendant.

How to proceed by Action.

The only difference in the commencement of this action from that of all others by bill is, that the following *ac etiam* must be inserted in the body of the *latitat* or other *process* issued on this occasion, notwithstanding the defendants are not arrested thereon, but only served with copies, *viz.* in pursuance of *R. E.* 15 *Geo.* 2. after the words in a plea of *trespass*, there shall be inserted the following clause, "and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognizance, according to the custom of our court, before us to be exhibited." Otherwise the defendant, or his attorney, shall not be bound to accept a declaration in debt upon such recognizance.

By action.

Ac etiam.

If this clause was not inserted, it would be a surprise on the bail, who, not knowing the cause of action, may let slip the time allowed them to surrender the defendant, and thereby discharge themselves. The bail cannot be arrested, let the amount of the debt be what it may.

The rest of the proceedings are the same as in other cases, only that the *venue* is to be laid in *Middlesex*. *Salk.* 564. 600. 659. Suing the bail below pending error in parliament, is a contempt and breach of privilege. 1 *Peere Will.* 685.

Venue.

A *ca. sa.* by original must have 15 days between the *teste* and return to charge bail. *Stat.* 13 *Car.* 2. c. 2. If by bill, eight days is sufficient. *Salk.* 599. 602. *Ld. Ray.* 1177.

Teste and return of *ca. sa.*

The bail not being able to surrender before the return of the *ca. sa.* the plaintiff, before the expiration of the eight days, within which bail are allowed to surrender, proceeded, and delivered a declaration conditionally; the bail offered to pay the original debt and costs, but not the costs against them of this action. Motion why the proceedings should not be staid on payment of the damages and costs in the original action. *Buller J.* The bail ought to surrender their principal upon the return of the *ca. sa.*; if they do not, a cause of action accrues against them, and therefore the costs of the declaration

The bail must pay the costs of the action on the recognizance, as well as debt and costs recovered, although they tender the original debt and costs before the 8 days in which they had to render.

ration delivered in the action against the bail, ought to have been rendered, before they had any ground for applying to this court to stay the proceedings. The allowing of the eight days after the return of the *ca. sa.* for the bail to surrender, is merely an indulgence given to them by the practice of the court, for they are liable, though the principal die after the return of the *ca. sa.* *Per Cur.* Upon payment of the costs in the former action, and the costs in the action against the bail, let the proceedings be staid. *Perrigal v. Mellish*, 5 *Tam. Rep.* 363.

Time of Render when sued by Action.

Time of rendering the principal where bail are sued on their recognizance.

It is ordered, that if any person or persons being, or hereafter shall become, bail or manucaptors in this court, for any defendant in any action whatsoever, and shall be impleaded by action of debt upon the recognizance in such suit acknowledged, such person or persons shall have liberty to render such defendant into the custody of the marshal of this court by the space of eight entire days in full term, next after the return of the writ of *latitat*, or other process, sued out against such bail; and upon notice thereof given to the plaintiff or his attorney (in the suit aforesaid), all further proceedings against such bail or manucaptors upon the recognizance aforesaid, shall cease. *R. Trin. 1 Anne.*

If four days in term.

If there be but four days in term after the return of the writ of *latitat* or bill of *Middlesex* in an action against the bail, the defendant shall have eight entire days in the next term to render. The case in 1 *Ld. Raym.* 72 v. was before the above rule, where it was ruled otherwise. *Vide* further on title *Render*.

Bail liable for so much as in the affidavit, though the plaintiff declares for, or recovers more than in the process.

It is ordered, that where the plaintiff declares for, or recovers a greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but be liable for so much as is sworn to, and indorsed on the said process, or for any lesser sum which the plaintiff in such action shall recover. *R. B. 5 Geo. 2.*

Explanation.

By this rule, no person being bail in court, or before a judge, shall, upon a recovery against the defendant, be answerable for any greater sum or sums than sworn to, or indorsed on the writ or process on which the defendant was arrested (although one part of the condition of the recognizance is to pay the whole condemnation)

demnation money, if the defendant does not); and if a greater sum be recovered, he shall not be discharged, but shall be liable for such sum or sums as *shall be sworn to, or indorsed*, or any lesser sum that shall be recovered against the defendant in such action wherein he became bail, together with costs of suit. *N. on the above rule.* And the court in this cause, on motion, staid proceedings *on the recognizance*, on payment of the debt sworn to, and costs. *Jackson v. Hassell, Dougl. 330. Contra in C. P.*

How to proceed by Scire Facias.

The regular mode of proceeding against the bail by *sci. fa.* by bill is, first get the bail-piece from the judge's chambers (if not already taken away), and take the same to Messrs. *Provost* and *Webb*, who file it, pay them 4d. *per term*. But if the bail be justified in court, then get the same of the master's clerk, pay him 1s. and file it with *Provost* and *Webb* (copy it first), and only proceed against those that justified (if there are more on the bail-piece), as they who did not justify may get leave to be exonerated *nunc pro tunc*. *4 Burr. 2107. Humphry v. Leite.* Then enter upon the roll the declaration and recognizance of bail, *with a memorandum of the term the declaration is of*; which is to be docketed and filed in the treasury chamber; in this case you will be obliged to pay a *post docket*, therefore get a number roll as of the term the declaration is of, at Mr. *Edge's*, pay 4s. 8d. and make a docket paper thus:

Entries of A. B. gentleman, one, &c. of the term of St. Hilary, 36 Geo. 3. 1796.

Middlesex^a. Entry of a recognizance of bail between J. A. plaintiff against C. D. and E. F. bail of J. C. Roll. 860.

Proceedings by *sci. fa.* against bail by bill.

^a Where the original venue is laid.

But if you have already carried in any rolls of that term, then the docket must be "*the further entry of, &c.*" Take the roll to the clerk of the judgments, he will enter the recognizance, pay 2s. and mark the roll, for which pay 1s. more, if for a further entry; if not 3s. for the docket, then take it to the treasury at *Westminster*, and file it.

The carrying in the roll is now dispensed with, but not the entry, and it seems if it is filed any time *before replication*, it will be sufficient, if the bail plead *nul tiel*

Roll and *ca. fa.* need not be filed till replication.

record; nor is there any occasion to file the *ca. sa.*, till replication. 3 Burr. 1360. *Hunt v. Coxe*.

The filing of the
ca. sa. cannot
be staid.

The principal died 14th March 1795, after the return of the *ca. sa.*, but before the return was filed, a rule was obtained, calling on plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece, and why the filing of the *ca. sa.* returned by the sheriff should not be staid. *Ashburst J.* We have been furnished by the officers of the court with the case of *Field v. Laby*, determined E. 24 Geo. 3. B. R. which was thus: *Cowper* shewed cause against a rule for staying the filing of the *ca. sa.* obtained by Sir T. *Davenport* on a suggestion that the principal was dead. Mr. J. *Buller* read the case of *Hunt v. Coxe*, and *White v. Satchwell*: the court said, there was no pretence for the motion, and discharged the rule. Therefore as this point has been determined so lately, when the former cases were considered, we think, that that case ought to govern the present, and consequently that this rule must be discharged. *Rawlinson v. Gunston*, 6 Term Rep. 285.

As yet of the term of St. Hilary, 36 Geo. 3. 1796. Witness *Lloyd lord Kenyon*.

Entry of recognizance of bail,

London, (ss.) Be it remembered, that on Saturday next after the octave of St. Hilary in this same term, before our lord the king at *Westminster*, comes *John Denn*, by J. K. his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against *Richard Fenn*, being in the custody of the marshal, of the *Marshalsea*, of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*; which said bill follows in these words, to wit, London, (ss.) here enter the declaration to the words "suit, &c."

Recognizance of bail.

And the said *Richard Fenn*, by J. K. his attorney, comes and defends the wrong and injury, when, &c. and thereupon *John Frost*, of, &c. and *Richard Mills*, of, &c. (the bail and addition exactly as in the bail-piece) came into the court of our said lord the king, before the king himself at *Westminster*, in their own proper persons, and became pledges and bail for the said *Richard*; and each of them became pledge and bail for the said *Richard*, that if it should happen that the said *Richard* should be convicted, at the suit of the said *John*,

John, in the plea aforesaid, then the said bail consented, and each of them consented, that all such damages as should be adjudged to the said *John* in that behalf, should be made of their and each of their lands and chattels, and levied to the use of the said *John*, if it should happen that the said *Richard* should not pay the said damages, or render himself to the prison of the marshal of the *Marshalsea* of the lord the king before the king himself on that occasion.

As soon as the entry of the recognizance is made and entered, and the *ca. fa.* returned by the sheriff, prepare a *sci. fa.* against the bail (*which must be issued in Middlesex, although the venue in the original action be laid in London*). 1 Burr 409. *Bond v. Isaac*. Salk. 600, 659. And if there are fifteen days between the *teste* of the *first*, and *return* of the *second by bill*, it is sufficient, without regard to the number of days between the *teste* and *return of each*. Str. 1139. And if one *sci. fa.* only is to be issued, *four days exclusive* are sufficient between the *teste* and *return*, by bill *Bell v. Jackson*, 4 Term Rep. 663. Ingross it on a 3s. 6d. stamped parchment; Messrs. *Provost* and *Webb* sign it, pay 1s. 8d. seal 7d. It may be tested on the *return day of the ca. fa.* if by bill; if by original, on the *quarto die post* of the *return day*; leave it at the sheriff's office for a *return of nihil*; (if you mean not to summon the bail,) pay 2s. On the *return day*, sue out an *alias, teste* it on the *return day* of the *first sci. fa.* sign and seal it, and leave it (*four days exclusive before the return*) at the sheriff's office, who will return it. Vide R. E. 5 Geo. 2.

*Sci. fa. how
sued out by bill,*

*Teste of one
sci. fa.*

Alias & teste.

The *alias sci. fa.* had not lain in the sheriff's office the last four days before the *return*; it was said on motion to set aside the *sci. fa.* issued against one of the bail, that it had lain there *four days before the return day*, it was returnable the 6th of *July*, and taken out of the office the 4th. *Per Curiam*. The rule is, that the writ shall remain there the last four days; and the reason is, that the sheriff may, if possible, serve it. *Forty v. Hermer*, 4 Term Rep. 583.

*The writ of
alias to lie the
last four days of
the return.*

But if you have only one *sci. fa.* which is to be returned *scire feci*^a, get a summons from the sheriff, di-

*If only one
sci. fa.*

^a The bail cannot be served with the summons but in *Middlesex*; therefore if they live in another county, there must be two *sci. fa.*'s returned *nihil*.

rected to an officer, who will summon the bail; and the summons is good, if left on the day of the return *sedente curia*; but this *sci. fa.* is to be left in the sheriff's office *four days exclusive before the return.* R. E. 5 Geo. 2. Pay for summons 2s. 4d. Officer for summoning each, 5s.

If summoned after rising of court.

If the sheriff summons the bail after the rising of the court on the return day of the *sci. fa.*, though he return *scire feci*, court will set aside the proceedings. *Pool v. Willis*, 2 Term Rep. 758.

Same determination, but on terms, not having exonerated the bail.

In *Webb v. Harvey* the reporter states, that the bail were summoned *before* the rising of the court, whereas they were summoned at three in the afternoon of the return day, which was after the rising of the court: the court ordered (that as the bail had rendered in the evening of that day at a judge's chambers, but not having entered the *exoneretur*, nor render in the marshal's book) all proceedings to be set aside upon payment of costs. 2 Term Rep. 757.

Sci. fa. in case.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas *John Denn*, lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against *Richard Fenn*^a, 25l. for his damages which he sustained, as well by reason of the not performing certain promises and undertakings made by the said *Richard* to the said *John*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard* is convicted, as appears to us of record; and although judgment thereof be thereupon given, yet execution of the damages aforesaid still remains to be made to him the said *John*: And whereas *John Frost*, of, &c. and *Richard Mills*, of, &c. lately, (that is to say) in *Hilary* term, in the 36th year of our reign, in our said court before us at *Westminster*, came personally in their own proper persons, and became pledges and bail, and each of them became pledge and bail, for the said *Richard*, that if it should happen the said *Richard* should be convicted at the suit of the said *John* in the plea aforesaid, then the said *John Frost* and *Richard Mills* consented, and each of them contented that^b all such damages as should be adjudged to the said *John*, should be made of their, and each of their lands and chattels, and levied to the use of the said *John*, if it should happen that the said *Richard* should

^a If the action be in debt, say, "as well a certain debt of 100l. as also 20l. for his damages which he had sustained as well by means of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard* is convicted, as, &c." and say afterwards, debt and damages.
^b As well the said debt, as all such damages.

not pay the said damages, or render himself to the marshal of our prison of the *Marshalsea* before us, on that occasion, as by the record of the said recognizance now remaining in our said court before us at *Westminster*, fully appears. Yet the said *Richard* hath not yet paid the said damages^a, or any part thereof, to the said *John*, or rendered himself to the marshal of our prison of the *Marshalsea* before us on that occasion, as we have received information from the said *John*; wherefore the said *John* hath humbly besought us to provide him a proper remedy in this particular; and we being willing that what is right and just should be done, command you^b, that by honest and lawful men of your bailiwick, you make known to the said *John Frost* and *Richard Mills*, that they be before us at *Westminster*, on next after to shew if they have or know, or either of them hath or knoweth, of any thing to say for themselves or himself, why the said *John* ought not to have his execution against the said *John Frost* and *Richard Mills* for the damages afore-said, according to the force, form, and effect of the said recognizance; if it shall seem expedient for him so to do, and further to do and receive all and singular those things which our said court before us shall then and there consider of them in this behalf. And have there then the names of those by whom you shall so cause it to be made known to them; and this writ. Witness, &c. *Mansfield and Way.*

^a Debt and damages.

^b If an alias, say, "as before we have commanded you."

^c debt and

Middlesex, sci. fa. for *John Denn* against *John Frost* and *Richard Mills*, bail of *Richard Fenn*, for 25l. damages, returnable on next after

Præcipe.

J. K. attorney.

The *scire facias*, if it be by *bill*, must be returnable on a day certain; by original, on a general return day, *ubique*. 2 *Lill.* 499.

On the return day of the first *sci. fa.* if it be returned *scire feci*, or on the return day of the *alias*, if returned *nihil*, give a rule thereon, which is wrote on a piece of plain paper thus: "*Denn* against *Frost* and another bail of *Fenn. Rule on sci. fa.*" The clerk of the rules enters it, pay 1s. 10d. it expires in four days exclusive^d;

Rule for judgment, if by bill.

^d It is stated in *Crompt. 95. Harr. K. E. 259.* and by the late master, that *Sunday* is no day. But the present master says, it is in the nature of a rule to plead, and should be so considered; and so is the practice in C. P.

having

having got the return from the sheriff, enter a part of the first *sci. fa.* as far as the sum recovered on the roll, take same to the clerk of the judgments, who will enter and mark the roll, pay 2s. an execution may then be sued out against them, either a *fi. fa.* or a *ca. fa.* *Str.* 1139. *Elliot v. Smith.* 1 *Lev.* 225. And though the *sci. fa.* be against both, yet execution may be levied on one, 1 *Sid.* 339.

But if there be a *nihil* returned on the first *sci. fa.* then no rule is given, until the *return day* of the *alias*.

Entry of two *sci. fa.*'s and *nihil* thereon, by bill.

Middlesex, (ss.) Our lord the king sent to his sheriff of *Middlesex* his writ closed in these words, to wit, *George, &c.* (copy to the end of the first *sci. fa.*) At which day, before our lord the king at *Westminster*, came the said *John Denn*, in his proper person, and the sheriff, to wit,

Award of the *alias*.

* The return of the *alias*.

Default of bail.

Judgment on the *sci. fa.*

, sheriff of the said county, returned to us, that the aforesaid *John Frost* and *Richard Mills* had not, or had either of them any thing in his bailiwick, where or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they, or was either of them, found in the same: Therefore, as before it is commanded to the said sheriff, that by good, &c. he make known to the said *John* and *Richard* that they be before our lord the king at *Westminster*, on^a next after to shew in form aforesaid if, &c. and further, &c. the same day is given to the said *John Denn* there, &c. At which day, before our said lord the king at *Westminster*, came the said *John Denn*, in his own proper person, and the sheriff as before returned, that the said *John Frost* and *Richard Mills* had not, or had either of them any thing in their bailiwick, where or by which he could give them or either of them notice, as by the said writ he was commanded, nor were they, or was either of them, found in the same. And the said *John Frost* and *Richard Mills*, although on that day solemnly required, came not, nor did either of them come, but made default. It is therefore considered that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* of the damages aforesaid, according to the force, form, and effect of the recognizance aforesaid, by the default of the said *John* and *Richard*, &c.

If there be only one *sci. fa.* and it is returned *sci. feci*, stop at the end of the sheriff's return, and then say: "And the said *J. F.* and *R. M.* although on that day solemnly required, did not, nor did either of them come. It is therefore considered that the said *John Denn* have execution against the said *J. F.* and *R. M.* of the^a damages aforesaid, according to the force, form, and effect of the said recognizance, by the default of the said *John* and *Richard*," &c.

If only one *sci. fa.* returned *sci. feci*, how to enter it.

Judgment.

^a debt and

If two Sci. Fa.'s be of different Terms.

If there be two *sci. fa.*'s issue of different terms, the first must be entered of the term wherein it is returnable, and an award of the second is sufficient, without setting it forth at large; *N. on R.* 5 *Geo.* 2. docket it, and let the clerk of the judgments mark the first writ at the time of the docket, and file it; this will save a post term; and in the next term, on the return of the second, the clerk of the treasury will enter the award of the judgment on the same roll, after the rule is expired, on leaving the writ with him.

If two *sci. fa.*'s of different terms, how to enter them.

How to appear.

If the bail appear, which is frequently the case, to get a term of the plaintiff, it is done by a note in writing, and there are no costs to be paid by them, unless they plead. 8 & 9 *W.* 3. c. 11. s. 3.

How to appear.

Costs:

If they appear, deliver a declaration upon treble *id.* give a rule to plead, and demand a plea as in other cases; if the declaration be not delivered four days exclusive before the end of the term, the defendant will be entitled to an imparlance.

If bail appear, declare.

Middlesex, (js.) Our lord the king sent to his sheriff of *Middlesex* his writ closed in these words, to wit, *George the third (copy the first sci. fa. and the return, to Mansfield and Way, and the award of the second as far as the sheriff's return; the same day is given to the parties aforesaid, &c. (then go on thus:)* At which day before our lord the king at *Westminster*, came as well the said *John Denn*, in his proper person, as the said *John Frost*, and *Richard Mills*, by *G. D.* their attorney, upon which the said *John Denn* prays, that execution may be adjudged to him, of the damages aforesaid, according to the force, form, and effect of the said recognizance, &c. Vide my *Mod. Pleader* 128.

Declaration.

The

How to intitle
the declaration.

The declaration may be intitled of the *term generally*, although the *sci. fa.* was returnable the last return of the term. 3 *Wils.* 154.

What Bail may plead in Discharge.

What the bail
may plead.

The bail may plead that *no sci. fa. ever issued against the defendant secundum cursum curiæ*; that "he died before the *ca. fa.* was returnable," *Roll. Abr.* 336.; that the plaintiff had other execution against him; that the defendant paid the money recovered, 1 *Roll.* 336. l. 31. 4 & 5 *Ann. c.* 16. s. 12. or a render of the principal, 3 *Lev.* 352. But they cannot plead, that the principal died before the return of the *sci. fa.* because if he died on the return day of the *ca. fa.* the bail are liable. 2 *Wils.* 67. They may plead *nul tiel record*, or a release to the defendant. 1 *Roll.* 336. l. 35. *Thompson's Ent.* 385. *Thefaur. Brev.* 265. 2 *Mod.* 312. *Latch.* 149. *Roll. Rep.* 897. *Lord Ray.* 156.

How replication
ought to con-
clude to a plea
of *sci. fa.*

To a plea of *sci. fa.* against bail, that the principal died before the return of the *ca. fa.* a replication stating a particular *ca. fa.* and that the principal was alive at the return of that *ca. fa.* must conclude with an averment. *Henderson v. Withy*, 2 *Term Rep.* 576.

Bail below not
liable to costs,
in error.

If there be error brought by the principal, which is afterwards nonprossed with costs, yet the bail in the original action are not liable to the costs, because they only became bound to pay the condemnation in that action and costs.

The bail to the
action are not
liable to pay the
costs of a writ of
error by the
principal.

Rule requiring the plaintiff to shew cause why, on payment of the debt and costs in the original action, and also the costs of the action against the bail, the proceedings against the bail should not be staid: the question was, whether the bail to the action were liable to pay the costs of the writ of error in the exchequer-chamber? The cases cited in support of the rule, 1 *Roll. Abr.* 135. *Baile Pl.* 15. *Penruddock v. Errington*, *Cro. Eliz.* 587. *Smith v. Faldo*, *Cro. Jac.* 366. *Mingay* shewed cause, and admitted that those cases were directly in point, and that he could not find any to the contrary, therefore, rule absolute. *Yates v. Doughan*, 6 *Term Rep.* 288.

How to proceed by Original.

How to proceed
by original.

The *ca. fa.* must be returnable on a general return day, *ubicunque*, &c. and must have fifteen days between the *teste* and return. *Stat.* 13 *Car.* 2. c. 2. This is much

much easier than the other, as its the filacer's duty to enter the recognizance, and docket the roll; therefore, after the *ca. fa.* is returned *non est inventus* against the principal, take it to him for the *sci. fa.* who will make it out, pay 7s. 2d. seal 7d. leave it at the sheriff's office: when it is returnable, apply to sheriff for it; if *nihil* is returned, then make out an *alias* yourself, which is a copy of the first, (excepting the *alias* part,) "therefore we command you as formerly we have commanded you," being added; sign it with Messrs. Provost and Webb, pay 1s. 8d. seal 7d. N. B. The filacer does not make out the *alias*, (and this agrees with the practice in the C. P. the prothon. signs the *alias*, and not the filacer.) I had this from the late master.

After the return of the second *sci. fa. nihil*, or of one *sci. feci*, give a rule on the *sci. fa.*, as before, on the *quarto die post* of the return-day, at the clerk of the rules, which expires in *four days after that day*; then enter the same on the roll (*if no appearance*), and take it to the clerk of the judgments, who enters same, pay 2s. the judgment by default is as before.

Rule for judgment.

Of the Appearance.

If the bail appear to the *sci. fa.* they do it by a *note in writing*, delivered to the attorney for the plaintiff, as by bill, but remember they are fixed for the debt and costs in the original action. N. B. A memorandum or warrant should be filed.

Appearance.

It seems the filacer has received appearances for bail. But there never was an instance of common bail being filed.

The condition of the recognizance by *original* differs widely from that by *bill*, as the former is in a *penalty*, and the latter generally to *render*; therefore it became a question, whether levying against the bail, the costs of the *sci. fa.* out of the *penalty* was legal? and it was held, that though *equitable costs* may be levied out of the *penalty of a bond*, yet it was too hard to suffer it to be levied against the bail; and the overplus money was restored to them. Str. 326. *Baldwin v. Morgan.*

Cannot levy costs on a *sci. fa.* against bail by original, though there is a penalty.

If execution issue against the bail, and no satisfaction from them, yet the plaintiff may take the principal.

Principal may be taken.

2 Cro.

2 Cro. 320. 549. 1 Sid. 107. If one of the principals be taken, and not the other, the bail are not discharged (unless the debt and costs be paid). 2 Lev. 195.

To be sealed
only ingrossed on
a 3s. 6d. stamp.

Fi. fa. in case.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, you cause to be made 40l. which *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*, as well by means of the not performing certain promises and undertakings lately made by the said *Richard Fenn* to the said *John Denn*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

And whereupon it was considered in our same court before us, that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* for the said damages, costs, and charges, according to the force, form, and effect of a certain recognizance acknowledged by them the said *John Frost* and *Richard Mills* in our said court before us, for the said *Richard Fenn*, at the suit of the said *John Denn*, in the plea aforesaid, by the default of the said *John Frost* and *Richard Mills*, as likewise appears to us of record;

and

Ca. sa. in case.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, if they be found in your bailiwick, and safely keep them, so that you have their bodies before us at *Westminster*, on next after to satisfy *John Denn* 100l. which the said *John Denn*, lately in our court before us, recovered against the said *Richard Fenn* for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said *Richard Fenn*, to the said *John Denn*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

and have you that money before us at *Westminster*, on next after to render to the said *John Denn* for his damages, costs, and charges aforesaid; and have there then this writ. Witness, &c.

Mansfield and Way.

Testatum fi. fa.

After the words (*for the debt and damages aforesaid*) say, "And our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said *John Frost* and *Richard Mills* had not, nor had either of them, any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof; whereas it is testified in our same court before us, that the said *John Frost* and *Richard Mills* have sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the damages aforesaid, and every part thereof; and have there then this writ. Witness," &c.

Fi. fa. in debt.

George the third, by the grace of God of *Great Britain, France, and Ireland* king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *John Frost*

and have you then there this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the day of in the 36th year of our reign.

Mansfield and Way.

Testatum ca. fa.

After the word (*record*) say, "And our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said *John Frost* and *Richard Mills* were not, nor was either of them, found in his bailiwick, whereupon on the behalf of the said *John Denn* it is sufficiently testified in our same court before us, that the said *John Frost* and *Richard Mills* lurk and secrete themselves in your county; and have then there this writ. Witness," &c.

Ca. fa. in debt.

George, &c. to the sheriff of *Middlesex*, greeting: We command you that you take *John Frost* and *Richard Mills*, the bail of *Richard Fenn*, if they be found in your bailiwick, and safely keep them, so that you have their bodies
K k before

Frost and Richard Mills, the bail of *Richard Fenn*, you cause to be made 100^l. which *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*, for a debt; as also 15^l. 10^s. which were awarded to the said *John Denn* in our same court before us, for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

And whereupon it is adjudged in our said court before us, that the said *John Denn* have his execution against the said *John Frost* and *Richard Mills* for the said debt and damages, according to the force, form, and effect of a certain recognizance acknowledged by them the said *John Frost* and *Richard Mills* in our said court before us, for the said *Richard*, at the suit of the said *John*, in the plea aforesaid, by the default of them the said *John Frost* and *Richard Mills*, as likewise appears to us of record:

And have you that money before us at *Westminster*, on next after to render to the said *John*, for his debt and damages aforesaid, and have you then there this writ. Witness, &c. *Mansfield and Way.*

What Time Bail have to render the Principal when the Proceedings are by sci. fa.

Bail rendering
on sci. fa.

If the bail mean to acquit themselves of their recognizance entirely, and run no hazard of the death of defendant, then they must render him in their charge, before the return of the ca. fa. as the death of

before us at *Westminster*, on next after to satisfy *John Denn* 100^l. for a debt which the said *John Denn*, lately in our court before us at *Westminster*, recovered against the said *Richard Fenn*; as also 14^l. 10^s. which were adjudged to the said *John Denn* in our said court before us, for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Richard Fenn* is convicted, as appears to us of record:

the principal afterwards will not discharge them.
2 Wils. 67. 2 Cro. 165. Jon. 139. Str. 511.

But if they do not, then they have until the return day, if the proceedings be by bill, *sedente curia*, of the first *sci. fa.* if it be returned *scire feci*; but if a *nihil* is returned thereon, then until the return day, *sedente curia*, of the second *sci. fa.* N. on R. E. 5 Geo. 2. And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *sci. feci*, if not, then till the *quarto die post* of the return day of the second. 4 Burr. 2134. 1 Wils. 270. If an action be brought, then eight days in full term, next after the return of the writ. R. Trin. 1 Ann.

How long the bail have to render, and when they are fixed on *sci. fa.*

Sci. fa. returnable 13 Feb. last return of Hilary term 1792—sheriff returned *scire feci*. The principal surrendered himself in discharge of his bail on 21st of Feb. Rule, why proceedings against the bail should not be set aside, there not being 15 days between the *teste* and return of the *sci. fa.* In support of the rule, my 5th edition of the Instr. Cler. was cited, p. 448. which states the time of render in an action against bail, and not where the proceedings are by *sci. fa.* and also, p. 433. that I took the practice to be, that there should be 15 days between the *teste* and return of one *sci. fa.*, in case of notice which would be equal to two *sci. fa.*'s returned *nihil*; so is the practice in the C. P. *Per Curiam*—There is no pretence for the first objection, that the principal was surrendered in time, it is contrary to every day's practice. Nor is there any foundation for the second; four days exclusive are sufficient between the *teste* and return of the *sci. fa.* when the proceedings are by bill. But as the defendants appear to have been mistaken by a book of practice in considerable repute, let rule be discharged without costs. *Bell v. Jackson and another bail of Sterling*, 4 Term Rep. 663.

When there is only one *scire facias* against the bail, and the proceedings are by bill, there need be only four days exclusive between the *teste* and return of it.

In p. 461 the practice is stated agreeable to this determination; and the court were misled by the counsel who cited my book; I having distinguished the time of render in an action in p. 448, and that on *sci. fa.* in 461.

With respect to the *teste* and return of one *sci. fa.* only, I must beg leave to refer to *Mod. Cas. in Law and Equity* 305. where only four days was between the *teste* and return, the court staid the proceedings. And

Cases contra

in 2 Jon. 228. Com. 53. Salk. 599. Skin. 633. every *sci. fa.* ought to have seven days.

Bankrupt.

A bankrupt attending the commissioners may be taken by his bail, and surrendered in their discharge. *Ex parte Gibbons*, 1 Atk. 511.

Render after court up, bad.

Per Cur.—The bail ought to render the defendant on the *quarto die post* of the return of the *second* scire facias *sitting the court*, (where proceedings are by original,) and a render *after the rising* of the court at a judge's chamber is too late. *Simmonds v. Middleton*, 1 Wils. 270.

Rule to be construed strictly as to the time of render, and must be *sedente curia* on the return day of *sci. fa.* and not at the judge's chambers.

The court unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the court, relating to the time and manner of *bail surrendering the principal*. They held, that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term,) without an *actual* bringing the defendant into court (which was then risen), or before a judge (none being accessible at that late hour), in order to have an *exoneretur* entered upon the bail-piece, was not sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tipstaff, and even lodged in the King's Bench prison, that very night, which the bail swore was the utmost; that the very late notice they received from the sheriff of the *sci. fa.* (which was returned *scire feci*) gave opportunity to them to do. *Hunt v. Cox*, 3 Burr. 1360. 4 Burr. 2134. certified by Master Owen, that the bail has, by original, till the *quarto die post* to surrender (provided it be done *sedente curia*). *Bailey v. Smeathman*.

Of exonerating the Bail without a Surrender in their Discharge.

Peer, or member.

If the plaintiff declare for a *different* cause of action from what is expressed in the process, or if he declare by *original*, in a *different* county from that where the action is brought, 3 Lev. 235. R. E. 2 Geo. 2. (a), the bail are discharged; if the defendant become a peer of the realm, *Dougl.* 45. or member of the house of commons, *Langridge one, &c. v. Flood*, *Esq.* H. 26 Geo. 3. at any time pending the action, court, on affidavit of these facts, will order an *exoneretur* to be entered

entered on the bail-piece. In *vacation*, a judge will order it. So if defendant becomes bankrupt, and obtains his certificate pending the action, and *before bail fixed*; he may, by summons on affidavit of the debt having accrued before he became bankrupt, and having obtained his certificate fairly and without fraud, be discharged; but such certificate must be produced to the judge. So if he be already surrendered, he may apply to be discharged out of custody on the like affidavit, and producing his certificate.

So the court will permit an *exoneretur* to be entered, if a defendant (*an alien*) be sent out of the kingdom, under *stat. 33 Geo. 3. c. 4.* unless bail are indemnified, or have money left in their hands to pay plaintiff. *Merrick v. Vaucher*, 6 Term Rep. 50. But court refused where 1000l. was left with the attorney who indemnified the bail, and a defence was made, to discharge the bail on payment of 1000l. *Coles v. De Hayne*, *Ibid.* 52. 246.

The defendant having been convicted of a felony, and sentenced to transportation:—Rule why an *exoneretur* should not be entered on the bail-piece, on the ground it was impossible for them to render the defendant. *Fowler v. Dunn*, in 4 Burr. 2034. was cited against the rule, but the court said, this was distinguishable from that case, where the difficulty arose from the defendant being actually *on board a ship* in the river *Thames*, which was ready to sail, and where the rule for a *habeas corpus* was refused on account of the inconvenience of bringing up the defendant at that period; but that there was no such difficulty in this case, the form of the motion being to enter an *exoneretur* on the bail-piece. Rule absolute. *Wood v. Mitchell*, 6 Term Rep. 247. Vide 2 Str. 1217. A *habeas corpus* used to be granted for this purpose.

How if in actual Custody of Sheriff.

If the defendant be in custody of any sheriff, the bail may have a *habeas corpus cum causa*, either in the term or *vacation*, to bring him before a judge, returnable immediately, in order to render him. Vide title *Habeas Corpus*.

An *impressed* man may be brought up by his bail under the keeper of the *Savoy* by *habeas corpus*, committed to the marshal, and then remanded back again,

Bond v. Isaac, 1 Term Rep. 339. but why not, as in the case of *Wood v. Mitchell*, apply for an *exoneretur* to be entered without the expence of a *habeas corpus*.

Bail may now render before expiration of rule to bring in the body.

It is ordered, that bail shall and may be at liberty to render the defendant (notwithstanding a rule to bring in the body has been served) at any time before the expiration thereof, (without a justification,) the attorney for the defendant giving notice of such render to plaintiff's attorney, without delay, and making affidavit thereof. *Rule Tr. 33 Geo. 3.*

May now render before justification; so after assignment of the bond.

The bail may now render the defendant before they justify after exception; so after an assignment of the bail-bond; and may afterwards apply to stay the proceedings on payment of those costs. *Edwin v. Allen*, 5 Term Rep. 401. *Meysey v. Carnell*, *Ibid.* 534.

So if one of the bail justifies tho' new bail, yet old bail may render if not exonerated.

So if on exception to bail, notice be given of other bail, and only one of whom justifies, and the names of the former bail still remain on the bail-piece, the former bail not having their names struck out, may render the principal. *Rex v. Sheriff of Essex*, 5 Term Rep. 633.

Bail in error.

Bail in error cannot surrender the principal although he become bankrupt. 1 Term Rep. 624.

How to render Defendant and exonerate Bail.

How to render defendant.

The name of the cause, and how far the plaintiff has proceeded therein, is material for the judge's clerk to have, if before declaration, the clerk should have the sum sworn to: defendant must be present, and the clerk will make out the commitment and surrender, for which pay 9s. 6d. if one cause, tipstaff 10s. 6d. and give him 3s. 6d. for the certificate of the surrender, which he will bring with him and deliver you: As soon as the bail have rendered the defendant, notice is to be given to the plaintiff's attorney, and affidavit of the service shall be made.

Notice to be given of the render.

Ordered, that where any defendant shall be rendered into the custody of the marshal, in discharge of his bail, the attorney shall, without delay, give notice of such rendering to the plaintiff's attorney, and shall make affidavit thereof, before the bail in that action shall be filed or discharged, and in default thereof, such render shall be void. *R. T. 1 Ann.*

If not; liable to costs, or shall not be delivered.

But it hath been held, that though notice is not given of the render, yet if plaintiff proceeds further against

against the bail, that shall not vitiate the surrender; but the bail shall not be delivered, till they pay the costs. 6 *Mod.* 238. 8 *Mod.* 281.

Ordered, that when any prisoner surrender, or is surrendered in discharge of his bail to the custody of the marshal, under the commitment shall be added, in *what state the cause or causes stand at the time of such surrender*; if before declaration, "*the sum sworn to on the arrest*"; if a declaration hath been filed or delivered, then the *sum sworn to* shall be also added, *declaration filed or delivered, issue joined, or interlocutory judgment signed*, as the case is; if after final judgment in debt *the debt and damages*; in other cases, the *quantum of the damages*. R. E. 8 *Geo.* 3.

Prisoner surrendering, the state of cause to be added under the commitment.

When notice has been given to plaintiff's attorney of the render, make affidavit thereof, and swear same before a judge; go to the judge's clerk, where the bail piece is filed, deliver him the affidavit, and he will give you the bail-piece; take same, with the *certificate* of the clerk of the papers, to the master, and he will enter an *exoneretur* thereon; pay him 2s. 4d. file the bail-piece with Messrs. *Provost* and *Webb*, pay 4d.; as soon as the bail are exonerated, go to the clerk of the judgment office, and enter the *committitur* and *surrender* in the *marshal's book*, which is absolutely necessary to be done. 1 *Salk.* 98. 272. R. T. 3 *Ann.* (a). Unless the master discharges the bail-piece, the bail are liable. N. on R. T. 3 *Ann.* (a). It is usual to make an entry of the render in the marshal's book, kept in the king's bench office. *Ibid.*

How to get an exoneretur entered by bill.

If by original affidavit, to be taken to the filazer.

In the King's Bench.

Denn v. Fenn.

Take notice, that the above defendant did this day surrender himself in discharge of his bail, and was thereupon committed by the honourable Mr. Justice *Grose* to the custody of the marshal, &c. there to remain until, &c. Dated the day of 1796.

Notice of surrender.

Yours, &c.

J. P. clerk to J. D. of, &c. gentleman, maketh oath and faith, that he did serve Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said Mr. J. K. at his chambers in *Clement's Inn* in the county of *Middlesex*.

Affidavit of service.

There is no occasion for the form of the entry in the marshal's book, as you will see many there.

K k 4

Ordered,

Principal rendering himself, the reddidit se, &c. to be left with the secondary, or judge's clerk; and a note for the marshal.

Ordered, that where any person shall render in court, or before a judge in discharge of his manucaptors, or shall be brought here in court upon a writ of *habeas corpus*, &c. in order to be committed to the custody of the marshal, such *reddidit se*, or writ of *habeas corpus*, with the return thereof, shall be left with the secondary, or the judge's clerk before whom such person was rendered, or brought to be filed; and that a copy or note of such rendering or return of the writ of *habeas corpus*, under the hand of such justice, or the secondary, shall be delivered to the marshal at the time of the commitment. *R. T. 3 Ann.* Such copy or note to be made by the attorney.

May take principal on a Sunday.

The bail may take the principal on a Sunday, and keep him till the next day, and then surrender him, 6 *Mod.* 231.; but they must stay with him, or take a note from him, consenting to stay at a lock-up-house, till a judge comes to town.

Of staying Proceedings against the Bail, (or the Principal upon the Judgment,) where a Writ of Error is brought by the Principal before the Time expires for their Surrender.

A writ of error is no stay of proceedings on the judgment by action.

A writ of error does not prevent the plaintiff from proceeding by *action of debt on the judgment, against the principal*, or by *sci. fa.*, or *action of debt on the recognizance, against the bail*: In such cases, however, if error be brought, and not mentioned for the purpose of delay, the court will stay the proceedings upon terms, pending the writ of error.

Must put in bail before motion.

If an action be brought against the principal on the judgment pending error, and he be held to bail, before he can apply to stay these proceedings, he must put in bail (and I think perfect them^a). 5 *Term Rep.* 9. *Smith v. Shepherd.*

a 4 *Term Rep.* 57.

If in an action on the recognizance,

Quære, If an action be brought on the recognizance against bail, whether an appearance must be entered previous to this motion; or if there be a *scire facias* against the bail, whether they must not first appear?

Proceedings against bail staid, pending error by the principal.

The plaintiff recovered judgment against the principal and took out a *ca. fa.* and had a *non est inventus* returned: of this judgment error is brought, and two days after the plaintiff sues out a *sci. fa.* against the bail, who now moved to stay the proceedings upon the *sci. fa.* as is done in cases where, pending error, the plaintiff

plaintiff brings an action of debt upon the judgment; insisting it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves by a surrender of the principal, which they can do at any time before the return of the second *sci fa*. *Cur.* thought it reasonable that the proceedings should be staid, on the bails consenting, that if the judgment be affirmed, they would render the principal, or give judgment on the *sci fa*. *Str.* 419. *Myer v. Arthur*.

It is now generally understood, that where error is brought by the principal within the time allowed by the court for the surrender of defendant by his bail, the court will, upon application, stay the proceedings against them until the writ of error shall be determined, *they undertaking to pay the plaintiff the damages recovered, or surrender him within four days next after the determination of the writ of error*, in case the same is in favor of the defendant in error. *Capron v. Archer*, 1 *Burr.* 340.

Per Curiam—Where the bail do not apply to stay the proceedings pending error, till their time to surrender is out, we will not give them any time for that purpose; but only *four days* to pay the money, *after the judgment is affirmed*. *Richardson v. Jelly*, 2 *Str.* 1270.

Plaintiff took out a *ca. fa.* 3d December, on 4th a writ of error was allowed; notwithstanding which, he called for a return of *non est inventus*, and then waiting till the writ of error was at an end, proceeded by *sci. fa.* against the bail. The whole proceedings were set aside; for the ground of them, *viz* the return of *non est inventus* was obtained *after notice of the writ of error*, which stopt all sort of proceedings. *Smith v. Nicholson*, *Str.* 1186. 2 *Lord Raym.* 1260.

Ca. fa. lodged in the sheriff's office the 13th May; the 19th a writ of error was served; the 20th the plaintiff got the *ca. fa.* returned; and then brought his action on the recognizance. *Lord Kenyon*—The proceedings against the bail are clearly irregular; the sheriff could not make a return to the writ until the 20th, before which time the writ of error was allowed and served. Rule to set aside proceedings absolute. *Perry v. Cambell & an.* 3 *Term Rep.* 390. *Str.* 867. *S.P.* *Sweetapple v. Goodfellow*.

If bail apply within time, the terms to stay proceedings are, that they pay or render within four days after affirmance.

If they do not apply in time.

Writ of error stops all proceedings, against bail, so that you cannot call for the sheriff's return.

Cannot get *ca. fa.* returned though error brought after it is left at sheriff's office.

But

Will not stay proceedings pending error, till bail put in.

If execution.

Where no bail is required, the bail applying to stay proceedings must undertake for the costs in error.

When the court will not stay proceedings.

If they undertake to pay, and error is brought in the house of lords after, it is that affirmance which is meant.

Where there is judgment against the bail, court will stay proceedings till affirmance upon terms, though error is in possession.

But if a writ of error is brought by the principal, and no bail is put in, so as to make it an *absolute super-sedeas*, the court will not stay the proceedings against the bail. *Str.* 781. *Hunter v. Sampson.*

If plaintiff obtains execution on *scire facias* against bail, pending error, the court will not set it aside. *Str.* 526. *Fisher v. Emerton.*

After judgment on *sci. fa.* against bail, motion to stay execution, the principal having brought error, and the bail undertaking to pay the condemnation-money and the costs on the *sci. fa.* in four days after affirmance; but in this case there being no bail on the writ of error, the court made the bail undertake also to pay the costs on the writ of error, in case the judgment was affirmed; and said it was a favor they were asking, and they would make them submit to equitable terms. *Riston v. Francis, Str.* 877.

The defendants brought error in *K. B.* and afterwards in parliament, and then suffered a *non pros* on the first writ; after this, they moved to stay proceedings on the judgment pending the second writ, which the court refused, being vexatious. *Entwistle v. Shepherd, 2 Term Rep.* 79. It is discretionary in the court. Similar applications were made and refused, it appearing that the writs of error were brought for the purpose of delay. *Ibid.*

If the bail undertake to pay the debt and costs within four days after affirmance in the *exchequer-chamber*, and the judgment is affirmed, the defendant brings error in parliament, the plaintiff shall not have execution until the affirmance there, because that is the final affirmance. *5 Burr.* 2819. *Kershan v. Cartwright.*

The plaintiff obtained judgment, and defendant brought a writ of error, and transcribed, which remained undetermined; defendant was served with a writ on the judgment, and for want of plea, judgment against him by default, and execution issued, and the sheriff in possession. *Cur.* said the proceedings upon it, as it would be unreasonable that the plaintiff should proceed in executing a judgment, which would of course fall to the ground in case the original judgment should be reversed; but defendant was bound not to bring a bill in equity. *4 Burr.* 2454. *Taswell v. Stone. Str.* 526.

The

The defendant's attorney signed a *cognovit*, and in it had consented that the bail should stand as a security for the debt. The court was moved for a rule to shew cause why that part of the *cognovit*, so far as to make the bail liable, should not be rescinded, and why the defendant's attorney should not pay the costs of the application; and on shewing cause, it appeared, that the bail were exonerated by the defendant's surrender in due time, and notice given. *Cur.* ordered that the bail should stand exonerated, and defendant's attorney to pay the costs of the application. *Simpson and another executrix v. Willet.*

Cognovit signed where defendant had consented that the bail should pay the debt: cognovit rescinded.

If two become bail in error, they cannot surrender the principal, though he become a bankrupt pending the writ of error, 1 *Term Rep.* 624. *Southcote v. Brathwaite*; for their recognizance is to prosecute the writ of error with effect, or pay the condemnation with costs. 2 *Cro.* 402. 3 *Mod.* 87. *In what cases error is no stay of proceeding, vide title Error.*

Bail in error cannot surrender principal.

Nonpros for not Declaring.

That upon appearance to be entered in the term wherein the writ, bill, or process is returnable, unless the plaintiff in any such writ, &c. shall put into the court from whence such writ, &c. did issue, his bill or declaration, against the person so arrested, in some personal action or *ejectione firmæ* of lands or tenements, before the end of the term next following after appearance, that then a nonsuit for want of a declaration may be entered against the said plaintiff. And the defendant in every such writ, bill, &c. shall or may have judgment to recover costs. *Stat. 13 Car. 2. stat. 2. c. 2. s. 2.*

For not declaring.

By the general rules of law, a plaintiff must declare within twelve months after the return of the writ. But by the rules of the court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *nonpros*. Though unless he take such advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration within the year. *Orley v. Lee, Mr. J. Buller, 2 Term Rep.* 112. 3 *Term Rep.* 123. *Penny v. Harvey.* The antient practice is laid down to be contrary; a declaration could not be delivered after the end of the second term (although a *nonpros* was not signed). 12 *Mod.* 217. *Harr. Pr.*

General rule plaintiff must declare in 12 months, but if he do not deliver declaration within two terms, he may be nonprossed.

Caf. contra.

307. *Rich. Pr.* 201. In the common pleas no declaration can be delivered after the *essoign* of the third term, nor can a *nonpros* be signed in the *third term*, unless there has been a rule for time to declare obtained.

Further time.

But if the matter should be under accommodation, or any thing should prevent the plaintiff's declaring *within two terms*, he may get a *side-bar* rule from the clerk of the rules for further time to declare (if defendant be not in custody), and must serve defendant's attorney with a copy thereof, pay 4s. 6d.

Bail must be filed in the term writ is returnable, or cannot *nonpros*.

The defendant did not file common bail *within two terms*, and plaintiff did not declare after the *end* of the *second term*; but before the third term, defendant filed bail, and entered a *nonpros*. On motion to set it aside, the master was of opinion, that a *nonpros* could never be signed, unless bail was filed *in the term* in which the writ was returnable. *Holmes v. White, E. 11 Geo. 3.*

How long to sign a *nonpros* by bill.

If the defendant files common bail *within the term* the writ is returnable, he has *twelve months* after to sign a *nonpros*; but he cannot do it at any time after. *White v. White, E. 11 Geo. 3.* But by the rule *M. 1654, f. 15.* a nonsuit may be entered at the end of the second term on a continuance over by *dies datus*, but not the third term or after.

By original.

If the action be *by original*, the defendant may sign his *nonpros* any time before the *essoign day* of the *third term*, without giving a rule to declare; but an appearance must be entered *the term in which the writ is returnable*.

If the writ be joint.

If the writ be joint, and the appearance several, the defendant cannot sign several *nonproffes*. *Comyn 74. 4 Burr. 2418. Pryce v. Foulkes et al.*

One cannot sign *nonpros* where there are several defendants.

Latitat against four, and four nonsuits signed, held irregular, because the trespass is joint, and though plaintiff may count severally, yet it remains joint till severed by the court. *Salk. 455. Allington v. Vavasor.*

The like.

Writ against three, one arrested and put in bail, plaintiff not having declared within two terms, *nonpros* signed by him, the other two not having appeared. Court were of opinion, that, in a joint action, the plaintiff could not be *nonproffed* by one, or *some* of the defendants *without the others*. *Powel v. White et al. Dougl. 169.*

When a *nonpros* may be signed against one in an action against two.

The defendant and another were joined in the writ, declaration filed *against the other only*. A *nonpros* was signed

signed for not declaring by the present defendant, and held regular; and it was said, that there had been cases where notice of declaration, and even taking out a rule to declare against *one defendant only*, have been held sufficient severance of the action, so as to entitle the other to sign judgment of nonpros. *Roe v. Cock*, 2 Term Rep. 257. *Butler v. Upton*, S. P.

If defendant removes the cause by *habeas corpus*, he cannot nonsuit the plaintiff for not declaring, for the plaintiff is not bound to follow him. *N. on R. Mich.* 16 Car. 2. But he must declare in two terms. *Ibid.*

Cannot nonpros if removed.

If a prisoner is superseded on filing common bail, he never can sign a nonpros, because he did not file bail in the term in which the writ was returnable.

Nor can a prisoner.

A nonpros cannot be signed pending an injunction. *Bowser v. Price*, E. 20 Geo. 3.

Nor pending injunction.

Court refused to set aside a regular nonpros against plaintiff who sued for a penalty on stat. of usury. It might have been a different consideration, in case the plaintiff had been the party really injured, and had sued in order to come at justice and reparation for such real injury. *Bennet qui tam v. Smith*, 1 Burr. 401.

Court refused to set aside a regular nonpros.

The defendant may take out a *ca. sa.* or *fi. sa.* for the costs, or bring an action on the judgment. 1 Wils. 316. *Murray v. Wilson*.

Ca. sa. or fi. sa.

The court have made an attorney pay the costs of a nonpros where he refused to produce his client, on an order obtained for that purpose, and an affidavit that he could find no such man as plaintiff. *Gwynn v. Kirby*, Str. 402. *Sayer Rep.* 172.

Attorney ordered to pay costs.

A nonpros may be set aside for irregularity on motion, but it must be on affidavit of the facts.

May be set aside.

A judgment of nonpros was signed, and an action was brought on the judgment.—The nonpros was irregular; the defendant in this action obtained two rules, the one to set aside the judgment of nonpros for irregularity, the other to set aside the proceedings in the action on the judgment. The plaintiff obtained another rule why the last of the two rules should not be set aside, as one rule would have answered the purpose of both. Court—That as the original action was the *substratum* of the whole, if that failed, the subsequent proceedings had upon it, whether by execution or another action, also failed with it; and that the whole might be set aside in one rule. That it was the practice so to do in actions

If an action be brought on a judgment of nonpros which is irregular, the whole proceedings may be set aside in one rule.

on

Defendant having surrendered in discharge of his bail in the K. B. removed himself by habeas corpus in the fleet, and plaintiff declared against him there, after the end of the second term after writ was returnable, a judgment of nonpros signed after, was irregular.

How to sign nonpros.

Nonpros for not declaring upon a bill of Middlesex.

a Writ of latitat.

The return.

on bail-bonds; and that they ought for the sake of œconomy to adhere to that practice. *Rule absolute. Barlowe v. Kaye, 4 Term Rep. 688.*

Writ was sued out 14th *Marth*, returnable the first return of *Easter* term 25th *April*: the defendant being arrested 17th *April*, put in bail above, and afterwards surrendered. In *Trinity* term he was removed by *habeas corpus* from K. B. to the fleet. On 1st *Nov.* declaration was filed against him in the C. P. and judgment of *nonpros* was signed on 6th *Nov.* in this court for want of declaration. *Buller J.*—If a prisoner be removed from the K. B. prison to the fleet before declaration delivered, the plaintiff has his election either to retain the cause *here* and bring it back by *habeas corpus*, or to declare against him in the *Fleet*: Rule to set aside the judgment absolute. *Sherfon & an. v. Hughes, 5 Term Rep. 35.*

In order to sign a *nonpros*, get a roll, and enter thereon the warrant of attorney for the defendant only, and ingross the *nonpros* thereon; also ingross it on a double half-crown stamp paper, which being done, carry same to the clerk of the judgments, who signs it, pay him 3s.

As yet of the term of the Holy Trinity, in the 36th year of the reign of king George the third. Witness, &c.

Middlesex, (ss.) Joseph Jones puts in his place *I. D.* his attorney, at the suit of *Charles Hobbs*, in a plea of trespass.

Middlesex, (ss.) Joseph Jones, according to the form of the statute in such case made and provided, was served with a precept^a of our lord the king, called a *bill of Middlesex*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex*, returnable on *Wednesday* next after fifteen days from the day of *Easter* now last past, to answer *Charles Hobbs* in a plea of trespass: and the said *Joseph* at that day appeared by *I. D.* his attorney, according to the form of the statute in such case made and provided; and the said *Charles*, in the aforesaid court of our said lord the king, before the king himself, at *Westminster* aforesaid, hath not declared by his bill, or declaration, in any personal action, or in ejectment, against him the said *Joseph*, before the end of *Trinity* term then next following, being the next term after the appearance of him the said *Joseph*: Therefore

it

it is considered by his majesty's court here, that the said *Charles* take nothing by his said precept^b, but that he be in mercy, &c. And it is further considered by the court here, that the aforesaid *Joseph* recover against the said *Charles* 40s. for his costs and charges laid out by him, about his defence in this particular, by the court of our said lord the king here, adjudged to the said *Joseph*, and by his assent, according to the form of the statute in such case made and provided; and that the aforesaid *Joseph* have his execution thereof, &c.

^b Writ.

Judgment signed
day of
1796.

If he was arrested "*put in the ac-etiam.*"

The costs now are taxed at 40s. for service of course, and if there be special bail, the master taxes the costs.

Action will lie
for costs.

If the defendant could have signed a *nonpros* for want of declaration at the end of the second term, and did not until a declaration was actually filed or delivered, it is irregular. *Orley v. Lee*, 2 Term Rep. 112. Executors and administrators pay costs of *nonpros*. 4 Burr. 1584.

Nonpros cannot,
after declaration
delivered, be
signed.

The plaintiff may also be *nonprossed* in any stage of the suit, for not complying with the rules of the court, viz. not replying to the defendant's plea, not surrejoinder to his rejoinder, not entering the issue when served with a rule within the time allowed for that purpose, which is a final judgment, and is signed on a double half-crown stamp paper, the master taxes these costs also.

Nonpros for not
replying, &c.

When a *nolle prosequi* may be entered on the record in an action against two, vide title *Record*.

Proceedings by Attornies.

IF an attorney sues *by original*, he waives his privilege; or if he sue in another's name, he does the same. 2 Str. 837. Therefore, if he means to sue as a privileged person, he must issue out an attachment of privilege, which is signed by Messrs. *Provost* and *Webb*, who take nothing, seal 7d. and a *præcipe* is to be left in the office. If bailable, affidavit must be made of the debt.

It is ordered, that from and after the last day of this term, every attorney of this court, who shall sue out any attachment of privilege against any defendant, shall leave a *præcipe* with the signer of the writs, with

Attorney suing
out an attach-
ment of privi-
lege against any
defendants, to

leave a *præcipe* with the signer of the writs.

the *defendant's names*, not exceeding *four in each writ*, with the *return* and *day of signing* such writ, with the *agent's* or *attorney's name* who sued out the same; and all such *præcipes* shall be entered on the roll, where the *præcipes* of *latitats*, and all other writs issuing out of this court are entered; and the officer that signs the writs in this court, shall not sign such attachment till a *præcipe* be left with him for that purpose. *R. H. 20 Geo. 2.*

As to suing a person in Wales.

If plaintiff, an attorney, sue, by attachment of privilege, a defendant *resident in Wales*, for words spoken there, and lay the *venue* in the *Welsh county* (in order that the cause may be tried in the next *English county*), and the judge at the trial certify, that the defendant was *resident in Wales*, &c.; that fact, thus certified, may be suggested on the judgment-roll, in order to entitle the defendant to enter a judgment of nonsuit under 13 *Geo. 3. c. 51.* The plaintiff in this case might have exercised his privilege, by laying the *venue* in *Middlesex*. *Evans one, &c. v. Jones, 6 Term Rep. 500.*

Attachment of privilege.

No memorandum necessary on a 2s. 6d. stamp.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you attach *Abraham Adams*, if he be found in your bailiwick, and him safely keep, so that you have his body before us at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, to answer *A. B.* gentleman, one of the attorneys of our court, before us, according to the liberties and privileges of such attorneys, and other ministers of the same court, from time whereof the memory of man is not to the contrary used and approved of in the same, of a plea of trespass, and also to a bill of the said *A. B.* to be exhibited against the said *Abraham*, for 500l. upon promises, according to the custom of our court, before us, and that you have there then this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the 12th day of *February*, in the 36th year of our reign.

A B. in person.

Bail for 250l. by affidavit filed.

To be ingrossed on a 3s. 6d. stamped parchment, and make a *præcipe* for the office, as in other cases, only call it an *attachment of privilege*. Held, that an attorney, plaintiff, need not indorse his name on this writ. *Field v. Lewen, 4 Term Rep. 275.*

Middlesex.

Middlesex. Attachment of privilege for *A. B.* gent. The præcipe, one, &c. against *Abraham Adams*. In case for 500l. upon promises, returnable on *Wednesday* next after fifteen days of *Easter*.

Oath for 250l. by affidavit } *A. B.* in person.
filed.

It seems that by *stat. 13 Car. 2. stat. 2. c. 2. s. 4.* there need no *ac-etiam* to be inserted in a writ of attachment; for though there be no particular cause of action expressed in the writ, the sheriff is not to discharge the defendant; but such lawful course is to be taken for security for appearance therein as heretofore used. *Vide 2 Wilf. 392. sed qu.*

If the action is not bailable, then leave out the *ac-* If action not
etiam, and add the notice to appear to it, as in a *latitat*, bailable.
or bill of *Middlesex*.

If the defendant appears, he files common bail with If appearance.
Mr. Nelson, with a memorandum or warrant on a 2s. 6d. stamp.

An attorney plaintiff cannot sue an attorney defendant in the same court by attachment of privilege, and hold him to bail, if he do, the defendant may plead his privilege in abatement, or the court will stay the proceedings without costs. *Barber one, &c. v. Palmer one, &c. 6 Term Rep. 524.* Attornies of
same courts

The declaration is engrossed on a treble 1d. stamp paper, the form of which is as follows:

Middlesex, (ss.) A. B. gentleman, one of the at- Declaration,
tornies of the court of our lord the king, before the king himself, being, according to the liberties and privileges of the same court, used and approved of in the same, from time whereof the memory of man is not to the contrary, present here in court in his own proper person, complains of *Abraham Adams*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself, of a plea of trespass on the case; for that whereas (*as in other cases; add pledges at the end*). The declaration for fees, with useful notes, and the proof necessary to support the declaration will be found in my *Mod. Pleader* 314. 318. with useful notes.

An attorney plaintiff is entitled to lay his *venue* in Attorney may
lay venue in
Middlesex, and it cannot be changed without his consent. *Vide title Venue. 2 Salk. 268. 3 Term Rep. 572.* *Middlesex*, but
if defendant, no
privilege of
changing it,
But an attorney defendant has not the privilege of
changing

changing the venue into *Middlesex*, when it is laid in another county. *Pope & ux. v. Redfearne un, &c.* 4 Burr. 2027. 3 Mod. 280. Carth. 126.

When defendant is to plead.

If an attorney delivers or files his declaration, and gives notice thereof, *four days exclusive before the end of the term wherein the attachment is returnable*, the defendant must plead as of that term, if rule to plead be given, and plea demanded. But if he does not deliver his declaration *four days before the end of the term*, or before the *essoign day* of the *subsequent term*, defendant will be entitled to an imparlance. *N. on R. M. 5 Ann. Reg. 3. a. Gilb. K. B. 346.*

All the other proceedings are exactly as in common cases, and when an inquiry is issued, or execution, you style him exactly as mentioned in the declaration.

N. B. Notice of trial or inquiry is the same as in other cases.

Need not indorse name on attachment.

When an attorney sues by attachment of privilege, his name need not be indorsed on the writ, for the 2 Geo. 2. c. 23. s. 22. only extends to cases where the attorney sues for another person. *Field one, &c. v. Leuen, 4 Term Rep. 275.*—The act should have required the place of abode to be indorsed, as well as the name of the attorney.

Proceedings against Attornies.

May be sued under 40s.

AN attorney has privilege to be sued only in the court where he is an attorney, and by bill; even as acceptor of a bill of exchange. *Dougl. 313. Comerford v. Price*, or for a debt under 40s. *Ibid. 381. Wiltshire v. Lloyd.* If he is sued by original, he may plead his privilege, *Ibid. 313.* and he ought also to sue in the same court. 1 Mod. 118. He has privilege in an inferior court under 5l. *Dy. 287.* in a suit of *quintam, &c.* 3 Lev. 398. *Lut. 196. 1 Salk. 30. 453.* If plaintiff and defendant are both attornies of the same court, the proceeding is by bill, not by attachment to hold to bail. *Str. 1141. 6 Term Rep. 524.* If sued as executor, &c. or jointly with others, he loses his privilege. 1 Vent. 298. *Salk. 544.*

Attorney of C. B. arrested here, must put in bail, if of this court no.

In *Str. 864.* it is said, that an attorney of the C. B. arrested in this court, must put in bail, and plead his privilege. But if arrested in the same court wherein he

is an attorney, he shall be discharged on common bail. *The Mayor of Basingstoke v. Bonner*, 1 *Wils.* 306. *S.P.*

In 1 *Wils.* 298. an attorney of this court was arrested by *latitat*, and held by the whole court, that it is a motion of course to discharge him on filing common bail. *Wheeler's case*. I find Mr. Justice Buller has done this often by summons. Same point.

An attorney sued as an executor, is not entitled to privilege, for he is sued in right of the testator, and not in his own right. 2 *Lill. P. R.* 246. Nor if sued jointly with others. *Comb.* 6. *Salk.* 545. If sued as executor.

It appeared that if the plaintiff had waited till the commencement of the term, the statute of limitation would have attached. A bill was filed in the vacation, and motion to set proceedings aside. Lord Mansfield—Public justice is concerned in this question. The master states the practice to be to file bills against attorneys in vacation. Fictions are allowed against all the king's subjects for the furtherance, but never for the hinderance, of justice. Why should an attorney be in a different situation from other persons? Rule to set aside proceedings discharged. *Lane v. Wheat*, *Dougl.* 313. A bill filed in vacation held good.

Mr. J. Buller, in *Camelford v. Price*, says, it must not be taken for granted that a bill against an attorney cannot be filed in vacation. *Dougl.* 314.

It is now settled, that an attorney of this court may be sued in the vacation, and he must pay the costs; and the court have said, that it will be putting attorneys in the same situation with all other defendants who may be sued in vacation. *Waghorne v. Fields*, 5 *Term Rep.* 173. *E. T.* 33 *Geo.* 3. A bill may now be filed against an attorney in the vacation, and he must pay costs.

The plaintiff filed a bill against defendant, an attorney, of *M. T.* 1792, as acceptor of a bill drawn 10th *Sept.* 1792, at three months; defendant demurred, and assigned for cause, that the bill appeared to be exhibited in, and was intitled of *Michaelmas* term; whereas the cause of action appeared to have accrued on a day subsequent to said term, the cause of action did not accrue till the 13th *Dec.* The court gave plaintiff leave to amend the bill (on payment of costs) as follows:—*Michaelmas* term, &c. Be it remembered, that on the 14th day of *December* (the day after the cause of action accrued) *A. Dodsworth* brought into the office of the clerk of the declarations of this court, according

according to the course and practice of the court, his certain bill against *W. B. gent. one, &c.* and filed the same bill as of *Michaelmas* term, in the 33d year of the reign, &c. which said bill follows in these words, &c. *Dodsworth v. Bowen*, 5 Term Rep. 325.

How to proceed.

The first step taken is, to prepare a bill against him, which is a complaint in writing, describing him as being present in court, 1 *Saund.* 28. (which is engrossed on treble penny parchment), file it with the clerk of the declarations in the king's bench office, with a memorandum or minute on a 2s. 6d. stamp, make a copy thereof on treble penny stamp paper, which deliver or leave at his house, with notice to plead thereto in four days (if it be filed four days exclusive before the end of the term). If the bill be not filed, and a copy delivered within that time, he is entitled to an imparlance, and to plead *within the first four days of the next term.* Vide *N. on R. E. 5 Ann.* A copy of the bill being left with the *known agent* to an attorney, is a sufficient delivery, and he is bound to plead to it.

If he live above
20 miles from
London.

It is now settled, that an attorney living above twenty miles from London, must plead in four days, attorneys being by a fiction of law always present in court: that this fiction obtained in cases where it was an advantage to attorneys, and that it ought equally to prevail where it was to their prejudice. *Mann v. Fletcher one, &c.* 5 Term Rep. 369. *Contra* in C. P. and Exch.

Trinity term, in the 36th year of the reign of king George the third. *Mansfield and Way.*

The bill.

Middlesex, (ss.) A. B. complains of *C. D. gentleman*, one of the attorneys of the court of our lord the king, before the king himself, present here in court, in his own proper person; for that whereas (as in other cases), "*and therefore he brings suit,*" &c. Pledges, &c.

I. K. attorney for the plaintiff.

Defendant in person.

How to indorse
on the back of
the copy of bill.

Indorse on your copy to be delivered to the defendant thus, "*This is a true copy of a bill filed against you, as of this present Trinity term, and unless you plead thereto in four days from the date hereof, judgment*" will

" *will be signed against you by default.*" Charge nothing for the copy, as he is not bound to pay for it.

The bill is filed with the clerk of the declarations, pay 4d. give a rule to plead, and demand a plea as in common cases; and if defendant does not plead, sign judgment, and execute a writ of inquiry, as in other cases. A demand of plea is necessary. The time for notice of trial or inquiry, is the same as in other cases.

If he pleads, you make up the issue with a memorandum as in other cases. *Vide* the new rule as to payment of the issue, p. 333.

If an attorney be arrested in an *inferior court*, he may have a writ of privilege to release him; but before he signs the writ, a certificate must be obtained from the master's clerk, Mr. *Boyle*, of his being an attorney (or of *the clerk of the warrants in C. P.* if he is an attorney of that court), pay nothing for signing, seal 7d. take it to the clerk of the papers of the inferior court, who will get the judge to allow it, and order defendant to be discharged out of custody.

If arrested in an inferior court, writ of privilege good. 2 Black. Rep. 1085.

George, &c. To the judges of our court of our palace, and every of them, greeting: Whereas, as well by reason of our royal dignity, as by an ancient custom, according to the same for times past used and approved hitherto, it hath obtained, that all and every our attornies assigned to enrol pleas in our court before us elsewhere than in our same court before us, ought not, nor have they, from time immemorial, been used to be compelled to answer before any secular judges on any pleas or complaints. And whereas we have already received information by the complaint of *C. D.* gentleman, one of the attornies of our said court before us, that several ill-disposed persons, intending to disquiet the said *C. D.* have levied one or more plaint or complaints before you, against the said *C. D.* and threaten to arrest and detain him in your custody thereupon, whereby the said *C. D.* is unable to attend his said office as an attorney, upon several affairs and suits depending in our said court before us, which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court before us, and the liberties and privileges thereof, but also to the great detriment of the said *C. D.* and his clients. And because we are willing that the jurisdictions, privileges, and customs, for

Writ of privilege, to be engrossed on a 3s. 6d. stamp.

so long time used and approved of in our said court before us, should be inviolably kept and observed, we command you, and every of you, that you wholly desist from proceeding further before you, or any of you, in the plaints aforesaid, or any of them, and that you inform the party or parties, plaintiff or plaintiffs in those plaints, that he, she, or they, may prosecute the same in our court before us at *Westminster*, against the said *C. D.* if he, she, or they, shall think it expedient so to do. Witness *Lloyd* lord *Kenyon*, &c.

Mansfield and *Way*.

This writ will serve to any inferior court except in its direction: it must be *directed right*, or need not be obeyed. *Vide* title *Habeas Corpus*.

How to Tax their Bills.

Attornies not to commence an action for fees till one month after delivery of their bills.

Judges to refer them to be taxed.

If it appears he has been overpaid, &c.;

No attorney of this court shall commence any action for the recovery of any fees, charges, or disbursements, until one month after he shall have delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode, a bill of such fees, charges, and disbursements, in a common legible hand, and in the *English* tongue (except law terms and the names of writs), and in words at length (except times and sums), subscribed with the proper hand of such attorney. And upon application by the party chargeable by such bill, or of any other in that behalf authorized, unto any judge of the court, &c. where the business, or the greatest part thereof in amount or value, was transacted, and upon submission of the party, or other person authorized as aforesaid, to pay the whole, that upon taxation what shall appear due to such attorney, the judge, &c. is required and empowered to refer the bill, and the whole of such demands thereupon (although no action be depending touching the same), to be taxed without any money being brought into court. And if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte* (pending which reference no action shall be brought), and upon such taxation the party shall forthwith pay to the attorney the whole that shall be found due, and in default be liable to an attachment, or process of contempt, or other proceeding, at the election of the attorney. And if upon such taxation it shall be found that such attorney has been overpaid, then the attorney

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attorney shall forthwith pay to the party all such money as the officer shall certify to have been so overpaid; and in default, shall in like manner be liable to attachment, or process of contempt, or other proceeding, at the election of the party. And the court is to award costs of such taxation, according to the event thereof, *viz.* if the bill taxed be less by a *sixth part* than the bill delivered, the attorney is to pay the costs; if not less by a *sixth part*, the court at discretion shall charge the attorney or client according to the reasonableness or unreasonableness of the bill. 2 Geo. 2. c. 23. s. 23.

If less than a sixth, to pay costs; if not less, the client to pay.

Nothing in the said act contained shall extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court, but that every such attorney, solicitor, or clerk in court; may use such remedy for recovering of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making the said act. 12 Geo. 2. c. 13. s. 6.

Not to extend to any bill of fees between one solicitor and another.

A bill may be wrote with such abbreviations as are commonly used in the *English* language. *Ibid.* sect. 5.

No rule ought to be made for referring an attorney's bill delivered to his client, unless there be a *cause* in court. 1 Salk. 332. 12 Mod. 251. 1 Salk. 89.

There must be a cause in court.

If an attorney refuses to deliver a bill to his client *signed*, he may take out a summons for that purpose before a judge; and if he does not on service attend thereon, an order will be made to deliver it within a reasonable time; which if he neglects delivering, upon making such order a rule of court, serving same, and make affidavit thereof, the court will grant an attachment, on motion.

Method to oblige an attorney to deliver his bill.

If the bill is delivered, then you may apply to a judge for a summons, to shew cause why it should not be referred to the master to be taxed upon which an order will be made on the client's undertaking in the judge's book, "to pay the attorney what shall appear to be due to him upon such taxation;" if the attorney does not attend, an order will be made of course; you cannot have a summons to deliver and tax a bill together.

How to proceed to tax it.

Get the master's appointment on the order, serve copy thereof, and the master will proceed on the first appointment.

If an attorney delivers his bill, and after his death it is taxed, and above a sixth part struck off, yet his executors shall not pay costs. *Str.* 1056. *Weston v. Pool.*

Attorney cannot be changed, without leave of court.

An attorney cannot be changed by his client, without leave of the court, or order of a judge, on payment of his bill as taxed by the master. *Dougl.* 217. *Macpherson v. Rorison*

New attorney to take notice.

The new attorney must, at his peril, take notice of all subsisting rules in the cause. *7 Mod* 50. Lord *Mansfield*—The bill of an attorney cannot be taxed at the trial of an action brought upon it, nor after verdict. If there has been an account settled between the attorney and his client, the bill shall never afterwards be taxed as of course: particular cases may be pointed out; the client may by affidavit shew, that the business charged was never performed, or that the charges are fraudulent; but if the business was really done, the delay of the defendant for more than a month in objecting to the quantum is an admission, that he thinks that reasonable. *Hooper v. Till, Dougl.* 199. *Williams v. Frith.* 198. *S. P.*

If an attorney means to let off, he must deliver bill in time so as it may be taxed.

Court held, that though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to let it off; that he must not produce it at the trial by surprise, but that it is sufficient in such case to deliver it time enough for the plaintiff to have it taxed before the trial. *Martin v. Winder, cited in Dougl.* 199. notes.

Conveyancing and parliamentary business.

A bill for conveyancing and parliamentary business, and also causes in this court, was held liable to taxation. So where fees paid to a proctor for business done in the ecclesiastical court, and made part of the bill, the whole bill was referred, and the master might tax that part. *Ibid.*

Convey.

If the whole bill is for conveyancing, it cannot be taxed. *Ibid.*

An attorney cannot maintain an action for business done at quarter sessions, unless he signs and delivers his bill, and stays one month.

Action for business done at quarter sessions by an attorney, question was, whether a bill ought to have been delivered signed, verdict for plaintiff subject to opinion of the court. *Ex parte Williams, 4 Term Rep.* 496. 124. was cited in favor of plaintiff. Lord *Kenyon*—There must be judgment of nonsuit; for upon inquiry it was found, to have been the practice of the court, to tax

tax such bills for business done altogether at the sessions; and there was no reason for restraining the general words of the first part of 2 Geo. 2. c. 23. s. 23. which requires an attorney to deliver his bill *one month* before he commences any action for the recovery of the amount. *Rule for nonsuit abs. Clarke v. Donovan.*

In this action, the plaintiff recovered a judgment against defendant for 182l. 10s. But defendant having also recovered in another action against the plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set off against the judgment in the former, suggesting that *Mitchell*, the plaintiff, had absconded; *Bearcroft* shewed cause on behalf of *Mitchell's* attorney in the first action; contending, that as he was not concerned as attorney in the other action, he had a lien for his costs on the judgment obtained by his client; and observed, that this was not such a debt as could be set off under the statute. Lord *Kenyon* said, that this did not depend on the statutes of set-off, but on the general jurisdiction of the court over the suitors; that this was an equitable part of their jurisdiction, and had been frequently exercised. But as to the other part, attorneys and solicitors of the different courts have a lien on all papers in their hands, and judgments recovered, for their costs; and he thought it right that the attorney in this case should be satisfied for his costs, before the defendant was allowed to make the set off. *Buller J.* Though this court have said that they will not interfere in the behalf of the attorney, and prevent the plaintiff from settling his own cause, without first paying the attorney's bill, yet when the adverse party against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied. *Rule absolute*, on defendant's undertaking to pay the attorney's bill, and on his entering a *remittitur* in the cause in which this defendant was plaintiff. *Mitchell v. Oldfield*, 4 Term Rep. 124.

It is stated that an agent's bill may be referred to be taxed, provided his employer bring into court the sum remaining due on the amount of the plaintiff's claim, and that what should be deducted, if any thing, should be

An attorney's costs taxed, must be paid before plaintiff can make a set-off in an action against him by the defendant in the former action.

Agent's bill may be taxed.

be afterwards repaid to him. *Dougl.* 200. *in notes, ex parte Bearcroft: sed quære.*

An executor may bring an action for his testator's bill *without signing it*, *Cooke's Rep.* 58. but such bill may be referred to be taxed on the defendant's undertaking to pay. *Mr. J. Aston*, 1780.

Proceedings against Peers.

AT common law, it was not usual to proceed against peers of the realm, or members of the house of commons. But now, by statute 12 and 13 *W. 3. c. 3.* any person having cause of action against any knight, citizen, or burghers of the house of commons, or any other person entitled to privilege of parliament, may prosecute such knight, &c. in the king's bench, common pleas, or exchequer, by *summons* and *distress infinite*, or by *original bill* and *summons*, *attachment* and *distress infinite*: which the said respective courts are empowered to issue against them, until he or they shall enter a common appearance or file common bail to the plaintiff's action, according to the course of each respective court; but the question is not determined whether *peers* can be sued or not by *original bill* and *summons*; the cases in favor of it are, *Say v. Lord Byron*, *Say.* 63. *Gosling v. Lord Weymouth*, *Cowp. Rep.* 182. But in *Littledale v. Lord Lonsdale*, stated in p. 9. *Eyre C. J.* says, it would have admitted considerable doubt (notwithstanding the cases) whether a *peer* can be sued by *bill*. The *common pleas* and *exchequer* hold plea against them by *bill*, *Ld. Ray.* 1442. *Str.* 1734. and *vide stat. 5 Geo. 2. c. 27.* which states that an *original* shall not be sued, unless the debt amounts to 10l.: suppose a peer to owe a less sum, how is it to be recovered in this court, unless he could be sued by *original bill*, and *summons*.

Under the above statute the plaintiff could not proceed against peers or members whilst sitting in parliament; therefore, to prevent delaying the king's subjects, the statute 10 *Geo. 3. c. 50.* enacts, that any person shall and may commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial

Suits may be prosecuted against peers and members,

of

or testamentary, against any peer or lord of parliament of *Great Britain*, or against any of the knights, citizens, and burgesses, of the house of commons of *Great Britain*, for the time being, or against their or either of their menial servants, or any other person, entitled to the privilege of parliament; and no suit, action, &c. shall be staied by or under color or pretence of any privileges of parliament, provided that nothing shall extend to subject the person of any of the knights, citizens, and burgesses, or the commissioners of shires and burghs of the house of commons of *Great Britain* for the time being, to be arrested or imprisoned, upon any suit or proceedings. *f. 2.*

Or against their servants.

Provido.

How to proceed by Original.

Prepare a *præcipe* for the curfitor of the county^a, who makes out the original, take a memorandum on a 2s. 6d. stamp or warrant, and annex thereto, pay fine to the king, and for the original writ, when sealed; take it to the sheriff who will make out a summons thereon, pay 2s. 4d. deliver it to your officer, who will leave the summons at defendant's house. After he has summoned defendant, get the original summons returned, and delivered over to the office. Then get a return to the writ, pay 2s. If he does not enter his appearance within *four days after the quarto die post* of the return with the filacer, he will make out a *distringas* thereon, and sign same; pay according to length, seal 7d. get a warrant thereon at sheriff's office, pay 2s. 4d. give it to your officer, who will levy 40s. If no appearance be entered on the *quarto die post* of the return, then get the writ returned, take it to the filacer, and he will make out an *alias*, on which move the court to increase the issues, which may be done on producing the return to the *first distringas*; fee to counsel 10s. 6d. Draw up the rule with the clerk of the rules, take same to the sheriff's office with the *alias*, and he will make out a warrant thereon for his bailiff to levy the amount ordered. If you have not obtained to the full amount of the debt and costs (which generally is given on the *alias*) you may proceed to get a return to the *alias* as before, and issue a *pluries*, move

Officer's fee 10s.

^a If the peer does not reside in the county where the *venue is laid*, you may have a writ of summons into the county *ubi he does reside*, on a return of *nihil* on the original by the sheriff.

the

Sect. 4.

Distre's ad infinitum.

It extends to all writs of distringas.

the court to increase issues to the full extent of the debts and costs incurred, which will now be granted; draw up the rule, and deliver it with the *pluries distringas* to the sheriff, he will make out a warrant to his bailiff to levy the amount. Then, if no appearance is entered on the *quarto die post* of the return, proceed by getting a return thereto; and move the court (in pursuance of the statute 10 Geo. 3. c. 50. s. 3, which enacts, that the court may order the issues levied to be sold, and the monies applied to pay such costs to the plaintiff as the court shall think just, and the surplus be retained until the defendant shall have appeared, or other purpose of the writ be answered; with this proviso, when the purpose is answered, then the issues shall be returned, or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distrained on) for a rule to shew cause why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof, should not be forthwith brought into court, and why it should not be referred to the master to tax the plaintiff his costs occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court, and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs is answered; fee to counsel, 10s. 6d. This is moved upon an affidavit of the several writs of *distringas* having issued, and the returns thereto, and that defendant hath not appeared; draw up rule, serve copy on sheriff, shew the original rule, move the court on an affidavit of the service and shewing the original rule, to make it absolute; draw up rule, serve copy on the sheriff, shew the original, and if he does not bring the money into court, he will be liable to an attachment. Make out bill of costs and tax them with the master. If defendant still holds out and does not appear, you may distrain him *ad infinitum*, until he does enter his appearance, and sell the issues from time to time.

It very seldom happens that a defendant stands out so far in contempt.

In *Raban v. Plaistow*, the court held, that the stat. 10 Geo. 3. extended to all writs of *distringas*, and not confined to such as concern privilege only; and ordered

dered the issues to be sold and the costs incurred to be taxed, and paid to the plaintiff, out of the money arising thereby, and the residue to be retained, in order to answer the event of the suit. 5 Burr. 2726. This was against the late sheriff.

Middlesex, (ss.) If *A. B.* makes you secure, &c. then put, &c. *John earl of Bath*, that he be before us on wheresoever, &c. to shew, for that whereas (here set the whole count or declaration), to the damage of the said *A. B.* of 500l. as he says, &c.

Præcipe for original.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you that you distrain *John E. of B.* by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that he be before us on wheresoever we shall then be in *England*, to answer *A. B.* in a plea (to the end of the *præcipe*), to the damage of the said *A.* of 500l. and to hear thereof judgment of his many defaults; and have you there this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the day of in the 36th year of our reign.

Distringas thereon. To be engrossed on a 3s. 6d. stamp parchment.

N. B. I cannot see the reason for copying the whole *præcipe* in this writ; why not in a plea of trespass on the case (unless for the sake of the fee)?

Appearance.

Defendant is to appear four days after the *quarto die post* of the first *distringas*, and to an *alias* or other *distringas* on the *quarto die post*. He enters it with the filacer, by delivering it on paper thus: "*Middlesex, appearance for John earl of Bath, at the suit of A. B.; J. K. attorney.*"

Appearance.

Pay for entering 2s. 6d. and deliver a memorandum or warrant on a 2s. 6d. stamp, and if the 40s. has been levied, call on the officer for it, and he must return same, or get a certificate from the filacer of defendant's appearance, produce it to the officer, if he will not pay, the judge will compel him by order, upon a summons for that purpose.

The plaintiff, in an action against a member, had proceeded agreeable to 10 Geo. 3. and obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*; and also for a rule for an attachment against the

If the defendant appear after levy on *distringas*, he shall pay the costs before he has the money returned.

the sheriff, but no issues had been actually levied; at length defendant appeared; whereupon it was moved that these rules should be discharged; for as no issues had been levied, they could not be sold, and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs before the rules should be discharged. And the court thought that reasonable, and directed that on payment of costs the rules should be discharged. They were of opinion that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed or not. 5 Burr. 2725. *Martin v. Townsend & an.*

The declaration.

Middlesex, (ss.) John earl of Bath was summoned to answer A. B. in a plea of trespass on the case, and whereupon the said A. B. by J. J. his attorney, complains that whereas, (to the end of the *præcipe*; but both in the *præcipe* and declaration leave out these words) "but contriving, &c. to deceive and defraud the said A. B. in this behalf," for the lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit.

When to plead.

If the declaration be delivered *four days before the end of the term*, the peer must plead, if he lives within twenty miles of *London*, in four days; country, eight days. And I take it, if he be in contempt, and afterwards enter his appearance, he is *not entitled to an imparlance*.

When a peer is not entitled to an imparlance on an *essoign* cast.

The plaintiff sued out a writ against a peer in a personal action, returnable the second return of *Easter* term. At the return, the defendant cast an *essoign*, which was not adjourned to any particular day; and on the first day of *Trinity* term, the plaintiff delivered his declaration. Motion for an imparlance. *Buller J.* It was held, that a corporation was not entitled to an *essoign*, and that there could be no *essoign* in a personal action. When an *essoign* is cast, the parties should adjourn to a particular day; but as that was not done here, and as no motion was made to quash the *essoign*, the declaration could not be delivered till the first day of the term. But the defendant is not entitled to an imparlance, where the plaintiff is prevented from declaring before the *essoign* day, by an *essoign* cast. And the court will be glad to use any means

means to prevent such a delay by the defendant. *Rule dish.* *Rooke v. Earl of Leicester*, 2 Term Rep. 16. 2 Will. 164. Vide 2 Str. 1191.

All the subsequent proceedings are the same as in other cases, only he cannot be taken in execution.

How to proceed by Bill, (if you think it right).

The bill is a complaint in writing, describing the defendant as having privilege, *Say. Rep.* 64. and concludes praying process to be made according to the form of the statute, &c. It is engrossed on treble penny parchment, and filed with the clerk of the declarations, annexing a warrant on a 2s. 6d. stamp; and the first process that issues thereon is a writ of summons (which you will see in the proceedings against members of parliament), directed to the sheriff of the county where the venue is laid. And if he cannot be found there, you may issue a *testatum summons* into any other county; on which, if no appearance is entered on the 4th day next after the return, (which in this case is made on a day certain,) you may issue a *disfringas*.

Appearance.

A peer must file common bail to a *disfringas* returnable at a day certain, within four days next after the return day, or an alias may issue on the next day, and to an alias, the very day of the return, or a pluries may issue, and so to all other writs of *disfringas*.

N. B. A memorandum on a 2s. 6d. stamp is necessary.

Middlesex. John earl of Bath (having been summoned) appears by L. K. his attorney, at the suit of A. B.

Common bail.

L. K. attorney.

London, to wit. A. B. complains of John earl of Bath of a plea of trespass on the case; for that whereas (same as against a commoner).

A bill against a peer.

Proceedings against Members of Parliament.

You may either proceed against them by original, or by bill; if by original, it is the same as against a peer; but if by bill, prepare a bill against him, and engross it on a treble 1d. stamp parchment, file it with the clerk of the declarations; if it is in vacation, and you want to sue him, you must file the bill, and intitle it

How to proceed against.

as

as of the *preceding term*. A warrant on a 2s. 6d. stamp is to be filed with the bill.

The bill.

Middlesex, to wit. *A. B.* complains of *C. D.* esq. (having privilege of parliament) of a plea of trespass on the case, for that whereas, &c. as in other declarations, except in the conclusion, there leave out the words "*contriving and fraudulently*," &c. and therefore he brings his suit, &c. And hereupon the said *A. B.* prays the process of our lord the king, according to the form of the statute in such case made and provided, to him thereon to be made; and to him thereon it is granted, &c. Pledges, &c.

Pray process.

As soon as the bill is filed, issue out the following summons, which is to be engrossed on a 3s. 6d. stamp parchment, signed by Messrs. *Provost* and *Webb*, pay 1s. 8d. and 7d. seal, sheriff for his summons 2s. 4d. officer for service 5s.^a

Summons.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you cause to be summoned *C. D.* esq. (he having privilege of parliament) that he be before us at *Westminster* on *Wednesday* next after fifteen days of *Easter*, to answer *A. B.* in a plea of trespass on the case^a, as he shall be able reasonably to shew that he ought to answer therein; and have there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 9th day of *May*, in the 36th year of our reign. *Mansfield* and *Way*.

^a As the action is.

Præcipe for summons.

Middlesex. Writ of summons for *A. B.* against *C. D.* esquire (having privilege of parliament), returnable on *Monday next after the morrow* of All Souls.

J. K. attorney.

If no appearance.

If defendant does not appear *within four days after the writ is returnable*, and the sheriff having returned him *summoned*, sue out the following *distringas*, which is engrossed on a 3s. 6d. stamp parchment, signed by Messrs. *Provost* and *Webb*, pay 1s. 8d. seal 7d. warrant 2s. 4d. officer for the levy 10s.

Distringas.

In the alias say,
"as before we
"have com-
"manded you,"
which is the
only alteration.

George, &c. To the sheriff of *Middlesex*, greeting: We command you, that you distrain *C. D.* esquire (having privilege of parliament), by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that

^a A *testatum* summons may issue into another county, on a *nihil* being returned on the summons.

you answer us for the issues of the same, so that he be before us at *Westminster*, on *Wednesday* next after three weeks from the day of *Easter*, to answer *A. B.* in a plea of trespass on the case upon promises, to the said *A. B.* his damage of 50*l.* and to hear thereof judgment of his many defaults; and have you there then this writ. Witness, &c.

The distringas ought to bear teste the day the summons is returnable, and any time between that and the return is sufficient.

Mansfield and Way.

Middlesex. *Distringas* for *A. B.* against *C. D.* esquire, (having privilege of parliament,) case, returnable on, &c.

Præcipe.

J. K. attorney.

If the defendant does not appear on the return day of the *distringas*, then get return from the sheriff, and issue an *alias*, and proceed as against peers to increase the issues.

Alias.

But if he appears, he files common bail, (in the same form as the peer,) and also a memorandum or warrant on a 2*s.* 6*d.* stamp, with the clerk of the bails.

File common bail.

If he has no goods whereby he can be distrained in the county where the venue is laid, get a *nihil* returned on the first *distringas*, and issue a *testatum* into the county where you intend to levy; go on in the former writ as far as "50*l.*" then say, "and for that our sheriff of *Middlesex*, at a certain day now past, returned to us, that the said *C. D.* had not any thing in his bailiwick whereby he could cause him to be distrained, as by the said writ he was commanded, whereas it is testified in our same court before us, that the said *C. D.* hath sufficient goods and chattels in your bailiwick whereby you can cause him to be distrained; and have there then this writ." Witness, &c.

Testatum distringas.

Vide Try's Jus Fillazaris.

When defendant has appeared, deliver him a declaration as of the term the appearance is of, and if delivered four days exclusive before the end of the term, he must plead without imparlance. The declaration is engrossed on a treble penny stamp paper, and is nothing more than a copy of the bill, only go as far as suit, &c. and add pledges; give a rule to plead as in other cases. He has the same time to plead as other persons; in town, or within 20 miles, four days; country, eight days, or above 20 miles.

Appearance and declaration.

Middlesex, (ss.) If *A. B.* makes you secure, &c. then put, &c. *Henry George*, late of *Westminster* in the said county, esquire, (having privilege of parliament,) that he be before us on wheresoever, &c. to shew, For that whereas.

Præcipe for original.

M m

The

The other proceedings are the same as against peers, by original.

If a member be in K. B. prison, a bill may be filed against him as being in custody of the marshal, and no summons need be issued,

The defendant, a member, being in K. B. prison, under a sentence on a criminal information, the plaintiffs filed a bill against him as being in custody of the marshal, but issued no summons. *Rule to set aside proceedings for irregularity. Per Cur.*—In ordinary proceedings against a person having privilege, a summons is issued for the purpose of bringing him into court. But that is perfectly unnecessary, where such a defendant is already in the custody of the marshal: in such a case, the plaintiffs may file a declaration against him, as being in custody of the marshal, though they could not charge him in custody in a bailable action. *Rule discharged. Jackson v. Mackreth, 5 Term Rep. 361.*

Corporations^a.

Corporations aggregate.

Corporations aggregate, consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are a mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church.

Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of course. *The Mayor of Lynn v. Denton, 1 Term Rep. 689.*

Corporations sole.

Corporations sole, consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. *Co. Lit. 43.*

When a corporation is erected, a name must be given it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not very material. *10 Rep. 33.* A corporation aggregate must always appear by attorney; for it cannot appear in person, being invisible, and existing only in intendment and consideration of law.

^a *Vide my Mod. Pl. 82. for useful notes.*

10 Rep. 32. It can neither maintain or be made defendant to an action of battery, or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic. *Brooke Abr.* 63. Neither can it be committed to prison, for its existence being ideal, no man can apprehend or arrest it. *Plow.* 538. And therefore also it cannot be outlawed, 10 Co. 32. b.; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do; for which reasons, the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. *Bro. Abr.* 11. 72. A corporation must be sued by *original writ*; for it cannot be declared against as in the custody of the marshal. 6 Mod. 183.

The proper process against them is a *distringas*, for no attachment lies against a corporation, *Raym.* 152. nor a *capias*, *Bro.* 43. 152. And upon a *distringas* issuing, the court will compel the sheriff to return good issues. *Salk.* 191. pl. 2. Care must be taken in stating their name of incorporation.

How to proceed.

An original writ, is the only ground of proceeding against a corporation. *Try* 11. For the service, see *Sty. Rep.* 367. 1 Vent. 351.

Draw a *præcipe* for the original, take it to the curfitor, who will make out and seal it, then get a summons thereon from the sheriff of the county, directed to his officer, who may leave same with their town-clerk, who will undertake for their appearance: if not, I should apprehend leaving the summons with the mayor will be sufficient; and if no appearance entered in due time, issue out a *distringas*, and an *alias*, &c. same as against peers.

The sheriff may distrain the lands and goods which constitute the common stock of the corporation. *Skin.* 27. If they have neither lands nor goods, there is no way to compel them to appear. *Skin.* 85. Vide 3 *Salk.* 104.

If they sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation; and the members cannot be witnesses for the corporation, 2 *Lev.* 232. 236. *Str.* 1069.; but they

May distrain
the land or goods
of corporation.

If they sue, it
must be by at-
torney.

may disfranchise one for that purpose. They may sue in common form by *latitat*, &c.

In ejectment the plaintiff declared on a demise made by a corporation, and did not set it forth by deed, or under the common seal, held good.

In ejectment in the common bench, the plaintiff declared upon a demise to him by the aldermen and burgesses of *Bury St. Edmund*, in the county of *Suffolk*, and did not set forth that it was by deed, or under seal of the corporation; upon not guilty pleaded, plaintiff had a verdict and judgment; and error was brought in *K. B.* and the error insisted on was, that this demise was void, because a corporation aggregate can do nothing but by deed under their common seal; and *2 Cro. 613.* was cited as parallel. *Sed per Cur.* Since that case, the law is altered as to this point concerning declarations in ejectment, for now they are grounded on fictions only. Judgment affirmed. *Patrick against Ball, Carth. 390. 12 Mod. 113.*

Essoign.

A corporation is not entitled to an essoign. *Argent v. Dean and Chapter of St. Paul's, E. 23 Geo. 3. 2 Term Rep. 16.*

Hundredors.

How to sue the hundred.

If an action be commenced on the statute of hue and cry, the plaintiff must take out his special *original writ*; for the inhabitants of a hundred cannot be in custody of the marshal; nor are they liable to a *capias*. *Bro. 43.* The only method to proceed against them is by *summons* on the original, and *distress infinite*. *3 Keb. 126. 2 Saund. 375. 4 Mod. 296.* And the original usually recites the statute. *Ibid.* To be tested 40 days after the robbery, otherwise it is error. *2 Lev. 12.* And within a year after the robbery. *1 Brownl. 156.* If several are robbed, they cannot join. *2 Lev. 12.* The declaration must be against the hundred *generally*, and must shew the robbery to be *within the hundred*, and *upon the highway*; if not, it is good after verdict. *Carth. 71. 1 Mod. 221.*

Declarations

V. Stat. 13 Ed. 1. c. 1. 27 Eliz. c. 13. No person to sue the hundred in case of robbery without notice to a constable,

By the 8 Geo. 2. c. 16. It is enacted, that no person shall maintain any action against any hundred, by virtue of the stat. 13 Ed. 1. st. 2. and 27 El. c. 13. unless he shall, over and besides the notice required by the stat. 27 Eliz. c. 13. give notice thereof to one of the constables of the hundred, or to some constable, &c. of some town, &c. wherein such robbery shall happen, or shall leave notice in writing of such robbery

bery at the dwelling-house of such constable, &c. describing in such notice, so far as the nature and circumstances of the case will admit, the felon and felons, and the time and place of the robbery; and also shall, within *twenty days* next after the robbery committed, cause public notice to be given in the *London Gazette*, describing as aforesaid, together with the goods and effects whereof he was robbed; and before any action commenced, go before the chief clerk, or secondary, or the filacer of the county wherein such robbery shall happen, or their deputies, or before the sheriff, and enter into a bond, to the high constable, &c. of the hundred in which such robbery shall be committed, in one hundred pounds, with two sureties, &c. with condition for securing to such high constable, &c. (who are empowered to enter an appearance, and defend such action,) the due payment of costs, after taxed, in case he shall be nonsuited, or discontinue, or in case judgment shall be given on demurrer, or a verdict given against him.

describing the case, and publishing in the *Gazette*;

and before action give security to, &c.

§ 2. "That when any such bond shall be entered into, the sheriff shall certify same to the chief clerk, &c. which certificate shall be delivered by the party robbed, to the chief clerk, &c. *before any process shall issue for the commencement of such suit as aforesaid.*"

The sheriff to certify such bond; and certificate to be delivered to the chief clerk before process.

The action must be brought within the year next after such robbery, 27 *El. c. 13. f. 9*; the day when the robbery is committed is included in the year, 1 *Brownl. 156. Hob. 139. Roll. Abr. 520. pl. 8.*; and the inhabitants within the hundred may be witnesses. 8 *Geo. 2. c. 16. f. 15.*

How to proceed.

Prepare a *præcipe* for the original, take it to the curfitor of the county where the *venue* is laid, and a memorandum on a 2s. 6d. stamp, pay fine to the king, and for original: when sealed make a copy thereof, which formerly used to be served on some inhabitant of the hundred. But by 8 *Geo. 2. c. 16. f. 4.* it is to be served on the high constable, &c. of the hundred wherein the robbery shall happen; who is to cause public notice to be given in one of the principal market towns within such hundred, *on the next market day after he or they shall be served with such process*; or if there shall happen to be no market town within the

High constable only to be served with the process, who is to give public notice thereof the next market day.

hundred, then in some parish church within the same hundred, immediately after divine service, on the *Sunday* next after his being served, and enter an appearance, and defend for the inhabitants, as advised.

If he do not appear.

If he do not appear in time, a *distingas* may be sued, and levied against all or any of the defendants, and you may issue an *alias* and *pluries*, and sell the issues under the stat. 10 *Geo.* 3. as it is determined, that the statute extends to *all writs of distingas*. *Raban v. Plaistow*, 5 *Burr.* 2726.

How to appear.

The defendant must enter appearance with the filacer on the *quarto die post* of the return of the original. A memorandum on a 2s. 6d. stamp is necessary.

The form of the declaration is in my *Modern Pleader* 85. with useful notes.

Ven. fac.

If the defendants plead, and there is an issue, the *venire facias*, by 29 *Geo.* 2. c. 18. s. 3. shall be awarded *de corpore comitatûs* (except the hundred against which the action is brought).

If judgment be given against the hundred, the sheriff to shew the writ to two justices, who are to tax and levy the charges as by stat. 27 *Eliz.* c. 13.

If judgment be given against *the hundred*, the sheriff, &c. on receipt of the execution against any inhabitant, shall cause the same to be shewn *gratis* to two justices of the county, &c. (whereof one to be of the *quorum*,) who are to cause such taxation and assessment to be made, and to be levied according to the 27th *Eliz.* (*viz.* by the constables, &c. rateably and proportionably, &c.), in which taxation and assessment there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such expences which the high constable hath been at, claim being made before the said justice, upon due notice for that purpose given; and the money levied, to be paid over by such constable, &c. within ten days after collection, to the sheriff, to the use of the plaintiff, for his costs and damages, and to the use of the high constable, for so much as his expences in his defence shall amount to; of which he shall give an account, on oath, before any taxation; and shall have no further allowance than what shall be taxed, which the high constable shall cause to be taxed for that purpose. Stat. 8 *Geo.* 2. c. 16. s. 4. The money paid over to the sheriff, shall (upon request) be by him paid over to the parties entitled, without deduction. s. 5. Sheriff not to be called

The money to be paid within ten days after collection to the sheriff, for the use of the plaintiff.

called on for return of writ until 60 days after writ delivered to him, who is to indorse on it, the day received. *f. 6.*

The 7th section provides in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, insolvent.

If persons, riotously assembled, in part demolish and pull down a dwelling-house, and at the same time destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable under stat. 1 Geo. 1. *f. 2. c. 5.* to yield damages for the destruction of the furniture as well as of the house, and costs. Riots.

Proceeding by Original. P. 34.

NO special writ, &c. expressing the cause of action, shall be sued out from any superior court where the cause of action shall not amount to 10*l.* or upwards. 5 Geo. 2. *c. 27. f. 5.*

It is ordered, That from and after the last day of this present Michaelmas term, in all actions in which the plaintiff shall proceed against the defendant by special original writ, and shall recover less than the sum of 50*l.* he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to, in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed). *R. M. 23 Geo. 3.*

It is ordered, That original writs, which by law ought to be signed by the filacers of this court, shall be signed by the said filacers before such writs be sealed by the officer of this court. *Hil. 31 Car. 2.*

It is ordered, That all writs and processes whatsoever issuing upon original writs before the appearance of the defendant, ought to be signed by the filacers of this court, according to the course of this court. *R. E. 31 Car. 2.*

How to proceed.

Prepare a *præcipe*, which is to contain the whole count or declaration, in which must be set forth the defendant's estate, degree, or mystery, and the town, or hamlet,

No more costs allowed in process by original, than a common writ, unless the debt recovered be 50*l.*

Writs by original to be signed before sealed, by the filacer.

All writs by original ought to be signed before appearance, by the filacer.

In common cases.

hamlet, or place, and county, where he is, or was conversant.

Præcipe for an original in case.

Middlesex, (fs.) If *A. B.* make you secure, &c. then put, &c. *J. D. late of Westminster in the said county, yeoman*, that he be before us on the morrow of *All Souls*, wheresoever, &c. to shew for that whereas (here set forth the whole count or declaration, and conclude thus): To the said *A. B.* his damage of 6*q*l. as is said, &c.

This is done on paper without a stamp, and taken to the filacer, No. 1, *Pump Court, Temple*, who will make out the *capias* thereon, to the sheriff of the county where defendant is to be met with. But mostly, for expedition sake, it is done by the attorney; pay him 5*s.* 4*d.* for the first count, and 1*s.* for every other; sealing 7*d.* If the defendant is to be arrested, prepare affidavit of the debt, engross it on a 2*s.* stamp paper, and it may be sworn either before a judge of this court or the filacer; oath 1*s.* warrant on the *capias* 2*s.* 4*d.* in *Middlesex* or *London*, other counties 2*s.* 6*d.*

Capias thereon.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take *J. D. late of Westminster* in your county, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of *All souls*, wheresoever we shall then be in *England*, to answer *A. B.* in a plea, for that whereas, (to the end of the *præcipe*,) to the said *A. B.* his damage of 6*q*l. as it is said; and have there this writ. Witness *Lloyd lord Kenyon* at *Westminster*, the 15th day of *June*, in the 36th year of our reign^a.

K. L. attorney.

Kenyon.

Bail for 6*q*l.

As to the teste.

There are many notes in the old books respecting the teste of the original and *capias*; and there can be no doubt but that they both may be returnable the same day, (unless you proceed to an outlawry,) and that the teste of the *capias* may be the last day of the preceding term, (though the cause of action accrued in the vacation,) otherwise, in a short vacation, an original could not be purchased; and every *capias*, alias, and pluries, must have fifteen days between the teste and return of each; and the morrow of the Ascension shall be a

^a If defendant is not to be arrested, the usual notice must be put at the end of the *capias* to appear, as in other process,

good

good return, notwithstanding there be not fifteen days between the fourth day of the said return, and the *essoign* day of the morrow of the Holy Trinity. 16 Car. 1. c. 6. s. 7.

The original may be *tested* in vacation, as well as in term time. *Sty. Rep.* 402. It should, however, be always *tested* after the cause of action accrued, 2 Burr. 967.; and be made returnable in term time *ubicunque*, &c. if plaintiff means to proceed to outlawry.—If not, the *capias* may be *tested* before the original, and even before the cause of action accrued, provided it be actually taken out afterwards, for no error can be assigned on mesne process. 3 Wils. 344. The original must have fifteen days between the *teste* and return.

Pay on original writs, where the damages exceed 40l. a *fine* to the king, in the following proportions:

	£.	s.	d.	
From 40l. to 66l. 13s. 4d. i. e. 100 marks	0	6	8	Fines to the king.
From 100 marks to 100l.	-	-	0 10 0	
From 100l. to 200 marks	-	-	0 13 4	
From 133l. 6s. 8d. to 166l. 13s. 4d.	-	-	0 16 8	
From 166l. 13s. 4d. to 200l.	-	-	1 0 0	
And for every 66l. 13s. 4d. more	-	-	0 6 8	
And for every 100l. more	-	-	0 10 0	
Every 100l. pays 10s. fine. R. H. 6 W. & M.				

Middlesex, (fs.) Command *A. C. late of Westminster, in the said county, merchant*, that justly, &c. he render to *J. B.* 100l. of lawful money of Great Britain, which he owes to, and unjustly detains from him, as it is said, &c. and unless, &c.

George the third, &c. to the sheriff of *Middlesex*, greeting; We command you, that you take *A. C. late of Westminster in your county, merchant*, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the morrow of All souls, wheresoever we shall then be in England, to answer *J. B.* in a plea, that he render to him 100l. of lawful money of Great Britain, which he owes to, and unjustly detains from him, as is said; and have there this writ. Witness, &c. *Kenyon.*

If it be at the suit of an executor or administrator, leave out the words, "owes to," and say, "unjustly detains."

If

Alias & pluries.

If defendant cannot be taken on the *capias*, plaintiff may sue out an *alias*, and after that a *pluries*; only adding the words to the *alias*, "*as formerly we have commanded you*;" to the *pluries*, "*as oftentimes we have commanded you*."

Testatum.

If defendant cannot be found in the county where the first writ was issued, or where you intend trying the cause, then sue out a *testatum capias* against him into that county where he is to be met with, directed to that sheriff, and after the words, "*to the said A. B. his damage of 100l. as is said*," add these, "*And our sheriff of Middlesex, at a certain day now past, returned to us, that the said C. was not found in his bailiwick, whereas it is testified in our same court before us, that the said C. lurks and wanders up and down in your county; and have there this writ. Witness, &c.*"

Teste.

The *teste* of the *alias* is on the *quarto die post* of the return of the *capias*, and the *teste* of the *pluries*, is on the *quarto die post* of the *alias*.

Testatum in the first instance.

And *N. B.* the *testatum* may be had in the first instance, without really suing out the *capias*, but you pay the filacer for it, who ought to make it out to warrant the *testatum*.

These writs are taken to the sheriff's office (if bailable) for warrants thereon, for which pay 2s. 4d. of- ficer for arrest, 10s. 6d. in town, country 1l. 1s.

How to appear (if no bail required).

Appearance.

The appearance is to be entered *eight days after* the return of the *capias*, and not the *quarto die post*, and filed with the filacer, for which pay 2s. 6d. and a memorandum or warrant on a 2s. 6d. stamp is to be filed at the same time.

Præcipe for appearance.

Middlesex, (fs.) Appearance for A. C. at the suit of J. B. to a capias returnable, &c. J. B. attorney.

If the defendant be served with an *alias* or *pluries*, then he is to enter his appearance in *eight days* next after the return of either; if not, the plaintiff may enter an appearance according to the statute, on an affidavit of the service; stating that the defendant was personally served on such a day with a true copy of a writ of special *capias*, (or *alias* or *pluries* special *capias*, as the case may be,) issued out of and under the

Affidavit of service.

the seal of this honorable court, returnable on, &c. wherefoever the king should then be in *England*, under which copy was written an *English* notice to the defendant, of the intent of such service, pursuant to the statute in that case made and provided.

How to appear if Special Bail required.

If the action requires special bail, and the defendant be arrested in *London* or *Middlesex*, the defendant must put in his bail before a judge within *four* days after the first day of term (if the writ be returnable the first return); if he is arrested in any other county, then within *six* days after (excluding one day).

If special bail, when to be put in.

If either the *fourth* or *sixth* day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail. *N. on R. M. 8 Ann. Reg. 1.*

If the writ be returnable on any *other* return, then the defendant has in town causes, *four* days after the *quarto die post* of that return, exclusive of the one day to put in his bail; if the arrest be in any *other* county, *six* days after the *quarto die post* of that return.

If writ be returnable on any other return.

Bail were not put in till two days after the *quarto die post* of the second return of the term; plaintiff assigned the bond. Motion to set aside the proceedings, on the ground that he had *four* days after the *quarto die post* to put in bail. The court held, that by *original*, the defendant had *eight* days from the return of the writ, (which is four days from the *quarto die post*), and a case was cited by the master, of *Brownell v. Taylor*, *M. 6. Geo. 3.* Rule absolute. *Frampton v. Barber*, *4 Term Rep. 377.*

If action by original, defendant has four days after the *quarto die post* to put in bail.

Bail by original is to be put in, *in the county where the capias issues*, for which purpose apply to the filacer for a short copy of the *capias*, and sum sworn to, then make a note of the names of plaintiff and defendant, and also the names and additions of the bail, on a slip of paper thus: "*Middlesex, John Denn* against "*Richard Fenn*, the bail are *Thomas Stoul*, of, &c. "*mercier*, and *Richard Mann* of the same place, carpenter."

How to put in bail.

J. B. attorney.

Sworn to 56l. 10s.

Take the bail with the filacer to a judge's chambers, (in term time he attends there regular,) who

A memorandum or warrant is to be delivered on a 2s. 6d stamp for defendant.

^a The filacer for *Essex* and *Monmouthshire*, *Andrew Edge* esq. All other counties, the *Hon. George Kenyon*.

will

will take their recognizance in double the sum sworn to, and pay him 16s 6d.

Notice of bail.

Give notice to the plaintiff's attorney the same as in common cases, only say, *put in with the filacer, before the Honorable Mr. Justice Grose*, at his chambers in *Serjeant's Inn, Chancery Lane, London*, and the names are, &c.

Country causes.

In country causes, the bail-piece is to be allowed by a judge of the court, before it is filed with the filacer.

Exception.

If plaintiff excepts, he does it in the filacer's book *within twenty days*, and delivers notice of such exception to the opposite attorney.

How to justify.

If there is an exception, then give notice to justify as by bill, and the same days are allowed. On the day of justification get the filacer to go to *Westminster* with his book, counsel to move 10s. 6d. filacer 7s. 6d. court fees 9s. have affidavit of the service of notice ready, as by bill.

May rule the sheriff.

The plaintiff may rule the sheriff to return his writ, and bring in the body in the same manner as by bill; but the *rules must keep pace* with the defendant's time.

May deliver declaration de bene esse.

The plaintiff may deliver his declaration *de bene esse*, upon the *quarto die post* of the return of his writ, and defendant has the same time to plead as by bill, and file it with the clerk of the declarations, the same as by bill.

If the action be brought in case, then the declaration runs thus:

Declaration in case.

Middlesex, (js.) A. C. late of Westminster, in the county of Middlesex, merchant, was attached to answer J. B. in a plea of trespass on the case, and whereupon the said J. B. by G. G. his attorney, complains, for that whereas (to the end of the præcipe as far as the damages, then say), "and therefore he brings his suit, &c. (No pledges are to be added).

Declaration in debt.

Middlesex, (js.) A. C. late of W. in the county of Middlesex, esquire, was summoned to answer J. B. of a plea, that he render to the said J. B. 100l. of lawful money of Great Britain, which he owes to and unjustly detains from him; and whereupon the said J. B. by A. B. his attorney, complains, that whereas, &c. (and so on through the declaration); wherefore the said J. B. saith that he is injured and

hath

hath sustained damage to the value of 100l.; and therefore he brings his suit, &c.

The declaration being drawn, is to be copied on treble penny, and delivered or filed, the same as by bill; and the charge is the same.

How engrossed, &c.

If a *capias* issue into one county, and the declaration is laid in another, the bail are discharged, though it is good against the principal, 3 *Lev.* 235. 245. otherwise by bill.

In what county to lay the venue.

Defendant formerly was not bound to plead till he had oyer and copy of the original, if he demanded it, but now he cannot have oyer although he demand it, by *Rule Trin.* 21 *Geo.* 3. and if he demands it, plaintiff may sign judgment without giving it, if no plea filed. *Ibid.* *Vide* title *Oyer*, p. 258.

Must plead now without oyer of the original writ.

If the defendant pleads, he files it (*if special*) with the clerk of the papers; if *general*, he may either enter it in the book kept by the clerk of the judgments, or deliver it to the attorney, on a treble penny stamp paper.

Plea.

The clerk of the papers also makes up the paper book by original, if there be a special plea filed.

But the attorney makes up the issue if the plea be general, or such a plea as need not be filed; in that case, he begins with *the declaration first* (*as there is no memorandum by original*), then the plea, and the award of the *venire* must be thus: *Therefore it is commanded to the sheriff, that he cause to come before our lord the king, from the day of the Holy Trinity, in three weeks, wheresoever he shall then be in England, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.*

When attorney makes up the issue.

Venire awarded.

The clerk of the papers always makes up the paper book or issue as of the term the declaration is filed or delivered, and impals over (if the plea is of a different term or the replication) to the term in which the issue is joined.

How clerk of the papers makes up the book.

If you have an imparlance to enter, the form by bill will answer (except as to the return day); in this case, you put a general day wheresoever, &c. instead of a day certain, as thus:

And now at this day, that is to say, on the morrow of the *Holy Trinity*, wheresoever, &c. until which day the said *A C.* had leave to imparl hereto, and then to answer the same, &c. (the same as by bill).

Imparl.

In

How to make
up a record.

In making up of the record, the *placitas* are the same as by bill, and after the first *placita* is entered, begin with the declaration, and go to the end of the issue (enter the 2d *placita* and then the *jurata* thus):

Jurata.

Middlesex, (ss.) The jury between *J. B.* by his attorney, plaintiff, and *A. C. late of Westminster in the said county, merchant,* defendant, of a plea of trespass on the case, is respited before our lord the king, until ———, wheresoever he shall then be in *England*, unless, &c. (the same as by bill).

How to pass
record.

Venire, &c.

The record is passed at the same place as by bill, the issue to be entered at the clerk of the judgments; *venire* and *distringas* are exactly the same, (except the return,) which must be on a general return day, "*wheresoever,*" &c. and the defendant's addition must also be put in (so is the writ of *subpœna*); *venire* and *distringas* are sealed, only pay 7d. each; *subpœna* is signed by Messrs. *Provost* and *Webb*, pay 1s. 8d. seal 7d. a *præcipe* is left for the office.

Judgment by
default.

If the defendant suffers judgment to go by default, sign it on a treble penny stamp paper, enter on the roll warrants of attorney for plaintiff and defendant, and no memorandum, but begin with the declaration, sign it at the clerk of the judgments, same as by bill.

N. B. The entry on the roll in this case is of the term the declaration is of, as the original will be returnable that term, to warrant the judgment. *Vide* 1 *Wilf.* 181.

Writ of inquiry.

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. C. late of Westminster in your county, merchant,* was attached to appear in our court before us, to answer *J. B.* of a plea, for that whereas (to the end of the declaration); and it was in such manner proceeded, &c. (exactly the same as by bill, only make it returnable on a general return day), "*wheresoever, &c.*" (pay 7d).

The sheriff executes it; proceed to final judgment the same as by bill, by giving a rule for judgment at the clerk of the rules, pay 1s. 10d. the writ of execution is sealed, pay 7d. warrant 2s. 4d. — The rule for judgment may be given on the return day (if not on a Sunday), and it expires in four court days after (Sunday or a *dies non* excepted).

Nonpro

Nonpros for want of Declaration by Original. P. 207.

It has been already observed, that plaintiff must declare *within two terms next after the return of the process*; if de does not, defendant may sign his *nonpros* without giving a rule to declare, (provided he appeared in the *term the writ was returnable*,) any time before the *essoign day* of the third term, if no declaration be delivered. For unless he take immediate advantage of the plaintiff's neglect, the plaintiff may still deliver a declaration, and that within twelve months. *Orley v. Lee*, 2 Term Rep. 123

As yet of the term of the Holy Trinity 36 Geo. 6.
Witness Lloyd lord Kenyon.

Middlesex, (ss.) J. B. puts in his place J. G. his attorney, at the suit of A. B. in a plea of trespass on the case.

Nonpros for not declaring.

Middlesex, (ss.) J. B. late of, &c. merchant, according to the form of the statute in such case made and provided, was served with a writ of our lord the king, called a *special capias ad respondendum*, issued out of the court of our said lord the king, before the king himself, directed to the sheriff of *Middlesex*, returnable in fifteen days from the day of *Easter*, where-soever our said lord the king should then be in *England*, to answer A. B. in a plea of trespass on the case upon promises, to the damage of the said A. B. of 40l. And the said A. B. at that day appeared by J. S. his attorney, according to the form of the statute in such case made and provided, &c. (the same as by bill).

To be signed on double 2s. 6d. stamp paper.

The pleadings may be amended in the same manner as by bill. But if the declaration is amended, and judgment by default, get the curfitor to *amend the præcipe* before he makes out the original, otherwise you must petition the master of the rolls for this purpose.

Amendment.

Proceeding to Outlawry.

IF the defendant is out of the kingdom, or absconds from being taken, the plaintiff may proceed to an outlawry against him.

It formerly only lay for *treason* and *felony*, but now by the stat. of 19 Hen. 7. c. 9. "*process of outlawry*" may

Outlawry in
civil actions.

"may be sued as well in actions upon the case, as in actions of trespass or debt," vide 25 Ed. 3. c. 17.; but it lies in no case but where a *capias* lies. 2 Roll's Ab. 76.

Outlawry, in civil actions, is considered as in the nature of civil process, to compel an appearance to the suit; or, if after judgment, to procure satisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, he pays all the costs, puts in sufficient bail, and does every thing he can, to put the plaintiff in as good a condition as he would have been in originally; or, if after judgment, the outlaw pays the debt and costs, the court reverses the outlawry upon motion, without any writ of error. The form of the reversal always is, "*For the errors assigned, and other errors appearing upon the record,*" though there is, in truth, no error at all. 4 Burr. 2549. *Rex v. Wilkes*.

A man outlawed is, when, by judgment of law, a man by his own default is ousted out of the law. *Co. Litt.* 112. b. 128. b. For every man at his age of twelve years ought to be sworn to the law in a tourn or leet, and by his outlawry he is *positus extra legem*. *Ibid.* 122. b. A woman who does not swear to the law by judgment of outlawry, is not said to be outlawed, but *waiviata*. *Ibid.* And therefore if a woman is said to be *utlagata*, it will be error. 2 Roll. 804. Where a *capias* does not lie in process, defendant cannot be outlawed before or after judgment; as upon a writ of privilege by an attorney, or another. 1 Leon. 329. If defendant avoids arrest, though he appears publicly, he may be outlawed. *Barnes* 320. On total absconding, no endeavours to arrest are necessary. *Ibid.* 322. If the defendant does not appear upon the return of the original, a *capias* issues. *Off. Br.* 22. *Reg. Jud.* 1. b. If he does not appear, nor taken on the *capias*, an *alias*, and afterwards a *pluries capias* issues. *Ibid.* The *capias* ought to be conformable to the original, and the *alias* and *pluries* to the *capias*. And if the defendant is not taken, or does not appear upon the return of the *pluries*, an *exigi facias* issues, which is also to be conformable to the original and *capias*.

When proceeded
on.

This mode of proceeding is used as well where, in an action against two, the one is arrested, and the other

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other cannot be found, for you cannot declare against them separately, therefore the other must be outlawed previous to declaration, 1 *Str.* 473. 1 *Wils.* 78.; and in order to take care that the bail of the one be not discharged; at the end of the second term of the return of the writ, get a rule to declare against him, serve it on his attorney, and continue so to do from term to term, till the other comes into court, or is outlawed; tell the clerk of the rules you are proceeding to outlawry, as the rule is out of the common form, pay 4s. 6d.

Although the defendant's partners live *out of the kingdom*, yet they may be outlawed, for where *several* persons contract *jointly*, plaintiff must sue all. In order to reverse the outlawry, they must put in bail, so that this proceeding may be the means of bringing them back to this country, where they may be sued by the defendant for a contribution, *Sheppard v. Bailie*, 6 *Term Rep.* 329. *Symonds v. Parminter*, 1 *Black. Rep.* 21. Such outlawries are not void by 31 *El. c. 3.* but voidable; and voidable only *sub modo*, by putting in bail by the party himself. *Lee C. J.*

May be outlawed although they live in Scotland.

If you outlaw other defendants, the declaration will be intitled the term the *outlawry is complete*, and not of the term the *first writ is returnable*. 1 *Wils.* 78.

Declaration.

If a *latitat* be sued against *two*, and *one* only be arrested and puts in bail, and you are obliged to sue the other to an outlawry, the *original* and *other writs* must be against *both*. If one of two defendants has put in bail, and proceeding to outlawry be had against the other defendant, the one who has put in bail cannot be *outlawed*, but *superfedeas* must as to him be issued and allowed by the sheriff, who will return it on the *allocatur exigent*, and outlaw the other. Vide 1 *Str.* 473. for the form of declaration, and my *Mod. Plead.* 341.

If a *latitat* be against two, and afterwards you proceed to outlawry.

How to proceed.

The first thing is to prepare an *affidavit* of the debt (*if you mean to hold him to bail*), then make a *præcipe* for the original as before, and take great care that the debt accrued due before the teste of it, otherwise it will be bad; but if he is not to be held to bail, then make a *præcipe* only, carry it to the filacer, pay him for same, and the fine to the king as before; he will

N n

make

A memorandum
or warrant to be
filed for plaintiff
on a 2s. 6d.
stamp.

make out a *capias*, *alias*, and *pluries* thereon, and the *capias* ought to be tested on the *quarto die post* of the return of the original, the *alias* on the *quarto die post* of the return of the *capias*, as also the *pluries* on the *quarto die* of the *alias*, and they are to be sealed; then leave them with the sheriff of the county where the *venue* is laid for a return of *non est inventus*, pay 1s. each name; when the sheriff has made his return, take them to the filacer, who will make out an *exigent* (which is to be conformable to the original and *capias*) and proclamation; the first of which requires the sheriff to cause the defendant to be demanded or exacted, in five county courts successively, to render himself, and if he does, then to take him, as in a *capias*.

The second commands the sheriff of the county, wherein the defendant dwells, or last dwelt, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. 6 H. 8. c. 4. 31 Eliz. c. 3. The writ is to bear *teste* and return the same as the writ of *exigent*, and to be sent to the sheriff where the defendant dwells, or was last resident, to execute. N. B. The filacer files the warrants of attorney.

When to have
an allocatur.

If there are not county-courts (or hushings, if in London) sufficient between the *teste* and return of the *exigent*, you must have an *allocatur exigent*, allowing as many exactions of the defendant as there are between the *teste* and return, and demanding him again to appear; and upon the *allocatur*, if there are not five exactions returned, you must have another, which the filacer also makes out. Kitch. 264. But if any county-day be past between the last of the former county-days and the return, no *allocatur* shall issue, but you must have a new *exigent*, for the demand of the party must be at five county-courts successively held one after another, without any court intervening. Plow. Com. 371. b. It is said the quickest way is to proceed in London, as the hushings are held oftener than the county-courts^a.

How to proceed
upon the *capias*
negatum.

If the defendant does not appear at the return of the *exigent* or *allocatur*, by putting in bail, or filing a common appearance (as the case requires), there shall be judgment *quod utlagat*. Kitch. 263.; then sue out

^a In London the hushings are holden once every fortnight. 3 Lev. 245. County-courts are held every six weeks only, therefore it is best to outlaw in London.

a *capias utlagatum*, "which is to extend the goods and chattels, lands and tenements, of defendant, and to take his body also:" if he be taken, he gives bail as hereafter; if goods, &c. be taken, get the sheriff to take an inquisition thereon (but no notice is required to be given), produce witnesses before the sheriff to prove deeds, or any other thing taken, that they are the defendant's, and an appraiser who has made appraisement thereof, to prove the value.

As soon as the *capias utlagatum* is returnable, get it from the sheriff, take a copy for yourself, carry it to the filacer, and he will make a transcript thereof, which take and file with your clerk in court, in the Exchequer office, King's-bench walks. Upon receipt of it, he will give an eight day rule on the back of the transcript, if there be so many days in term, otherwise the rule must be for the general seal after term for any one to come in and claim the goods seized; if no one claims, then he make out a *venditioni exponas*, directed to the sheriff, to sell the goods and chattels appraised, and found upon the inquisition.

Transcript.

If the plaintiff gets a friend to take them at the appraised value, pay the money to the sheriff, who will make a bill of sale of same; or if leases are taken in possession he will assign same, and return the *venditioni exponas*, which is filed with your clerk in court. The sheriff expects, in these cases, an *extra fee*, and he is to be paid his poundage thereon.

How to proceed after sheriff's return.

If the debt be above 50*l.* and not otherwise, then prepare petition to the lords of the Treasury, "praying that the money levied, and in the hands of the sheriff, may be paid to the plaintiff, towards satisfaction of his debt and costs;" a certificate of the transcript must be certified by the clerk in court under the petition, which leave at their office (a fee *extra* is requisite to their clerk for expedition); their answer is, "a reference to Joseph White, Esq. their solicitor," of Lincoln's-Inn, who will, on request, order you to appear before him, to make out the plaintiff's demand; he will require an affidavit of the plaintiff, sworn before a judge, together with an affidavit of his having paid his solicitor the costs, as by the bill of costs annexed. *N. B.* If the action be upon notes, bills, or other securities, he will require them to be produced before him, and, upon his report, what there is

Petition, &c.

due for the debt, and perhaps he may report the costs (for it is discretionary, they being given by the lords); then file the same with the clerk of the Treasury, and get him to procure the king's sign manual, for the attorney general to consent to your motion, "that the money may be paid over to the plaintiff;" after the king's sign manual is obtained, give brief to counsel, with half-a-guinea, to move the court of Exchequer, "that the money returned upon the *venditioni exponas* by the sheriff of *Middlesex*, be paid to the plaintiff;" also give brief to the attorney general to consent, pay him 2l. 2s. clerk 2s. 6d. and on such motion and consent, the court will order it to be paid accordingly.

If 50l. only, then no need for the king's sign manual.

But if the sum levied exceed not the sum of 50l. there need no application to the Treasury; for the court of Exchequer, upon reading the return of the *venditioni exponas*, will, upon motion of your counsel only, order it to be paid.

Clerk in court draws up order, and makes out a subpoena; if the money is not paid, move court for an attachment. Exigent.

The clerk in court will then draw up the order, and seal a *subpœna* at the same time for the sheriff to pay the money to plaintiff forthwith, which plaintiff may demand at the sheriff's office, and if not paid, may move for an attachment against him.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you cause *C. D. late of Westminster in your county, merchant*, to be demanded from [if in *London*, say, hustling to hustling] county-court to county-court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he does not appear; and if he does appear, then take him and safely keep him, so that you have his body before us, on _____ wheresoever we shall then be in *England*, to answer to *A. B.* of a plea, for that *whereas* (here insert the whole *præcipe*), to the said *A.* his damage of 600l. as it is said; and whereupon you did in _____ last past (*the return of the pluries*) make return to us, that the said *C. D.* was not found in your bailiwick; and have you there this writ. Witness, &c. Kenyon.

To be signed by the filacer, pay him according to length, and seal 7d.

Proclamation.

George the third, &c. To the sheriff of *Middlesex*, greeting: Whereas, by our writ, we lately commanded you, that you cause *C. D. late of Westminster*

in your county, merchant, to be demanded from a county-court to county-court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he should not appear; and if he should appear, then that you should take him and keep him safe, so that you might have him before us on wheresoever we should then be in *England*, to answer to *A. B.* in a certain plea of trespass on the case, to the damage of the said *A.* of 600*l.* as is said: We command you, that according to the statute made in the 31st year of the reign of *Elizabeth*, late queen of *England*, you cause the said *C. D.* to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said *C. D.* is an inhabitant, that he render himself to you, so that you have his body before us at the aforesaid time, to answer the said *A. B.* of the plea aforesaid; and have there this writ. Witness, &c.

a Hustling to hustling, if in London.

Kenyon.

To be also signed by the filacer, pay him 7*s.* sealing 7*d.*

A man outlawed in a personal action, forfeits his goods and chattels, 1 *Salk.* 305. and his chattels real, as a term for years, 2 *Rol.* 806. *l.* 43. If tenant at will sows his lands, the king shall have the emblements. *Ibid.* The king shall have all the profits of his freehold lands. 2 *Rol.* 807. But in a personal action it shall be for the benefit of the party. *Caf. in Parl.* 73.

What he forfeits.

In personal actions he does not forfeit any lands of which he has estate of freehold, 2 *Rol.* 807. nor a real charge for life, *Hut.* 54. Copyhold not liable to be seized, *Parker* 190.

What not.

The greatest strictness is required in proceedings of outlawry. Each *capias* shall be returned. If the day and year of the king be inserted in the 1st, 2d, 3d, and 5th exaction, but omitted in the 4th, it is erroneous. *H. P. C.* 203. The stating that such a day in the 30th year of the reign he exacted the defendant a third time; that afterwards on such a day (omitting the year), he exacted him a fourth time; and that afterwards on such a day in the 30th year aforesaid, he exacted him a fifth time, is insufficient and a good ground of reversal. *Rex v Almon*, 5 *Term Rep.* 202.

As to the return by the sheriff.

4 Burr. 2564. *Rex v. Wilkes*, 2 Roll. Abr. 802. pl. 8. which was published by Lord Hale. In a record of outlawry, it is necessary to state the year of the king's reign, *Hard.* 6, 7. in which every transaction happened; though not required in other records. *Buller J.* 5 Term Rep. 205.

Special capias
utlagatum.

The day he was
outlawed.

George the third, &c. To the sheriff of *Middlesex*, greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that, by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, *C. D. late of Westminster in your county, merchant*, hath or had in your bailiwick the day of _____ last past, or at any time afterwards, on which day he was outlawed in your county, at the suit of *A. B.* in a certain plea of trespass on the case, to the said *A. B.* his damage of 600*l.* as you have returned to us some time since, and by their oath cause the same to be extended and appraised, according to the true values thereof; and what you find by that inquiry take into your hands to us the values and issues thereof; and having so extended and appraised the same, what you shall have done herein, make known to us on _____ wheresoever we shall then be in *England*, distinctly and plainly under your seal, and the seals of those by whose oath you shall have made the extent and appraisement: And for that the said *C. D.* conceals himself, and runs up and down from place to place in your county, in contempt of us, and in prejudice of our crown, as we are informed; we command you, that you take the said *C. D.* wheresoever he be going in your county, as well within a liberty as without, and keep him safely, so that you have him before us at the aforesaid time, to do and receive what our said court before us shall in this case determine; and have you there this writ. *Witness, &c.*

Kenyon.

To be signed by the filacer, and sealed; pay signing 7*s.* 8*d.* seal 7*d.* warrant to the sheriff 2*s.* 4*d.*

What debts are
liable to be seized
upon the capias
utlagatum,
and how the
king is to recover
them; he
can only take
the profits of the
land.

When the outlawry is returned on the *exigi facias*, by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general to arrest the body, and extend the goods and lands, and also debts and *choses in action* belonging to the party outlawed, *Lut.* 330.; and when such inquisition is re-

turned

turned by the sheriff, a transcript of the outlawry and inquisition is returned into the *Exchequer*, and thereupon if any debt be returned due from any one to be outlawed, on application to the *Exchequer*, a *sci. fa.* issues to such person to shew cause, why the king should not have such sum found due on the inquisition to the outlawed; and therefore the transcript of this record is sent into the *Exchequer*, that the court of ordinary revenue may have it in charge; but the court of *Exchequer* usually grants a *custodiam* to such person as sued the outlawry. *Hard. 422. Carth. 441. Yelv. 19. 2 Vern. 314.*

If the defendant be taken upon the *capias utlagatum*, the plaintiff cannot declare against him; for the process is determined. *Cro. Eliz. 706.*

To the Right Honourable the Lords Commissioners of his Majesty's Treasury.

The humble petition of A. B.

Sheweth,

That C. D. late of merchant, being justly indebted unto your petitioner in the sum of upon a promissory note of hand, bearing date the 22d day of June 1794, and also in 20l. for goods sold and delivered to the said C. D. your petitioner was obliged to outlaw him for the recovery thereof.

Petition to the lords.

That a writ of *special capias utlagatum* having issued against him, out of his majesty's court of King's Bench, at *Westminster*, at the suit of your petitioner, an inquisition was taken thereon by the sheriff of *Middlesex*, whereby certain goods and chattels to the value of 80l. mentioned in the said inquisition, were by the said sheriff seized, and taken into his majesty's hands; which writ and inquisition being transcribed into his majesty's court of *Exchequer*, at *Westminster*, a writ of *venditioni exponas* duly issued out of the said court, whereon the said sheriff hath returned, that he has, by virtue thereof, sold the goods and chattels in the said writ mentioned, for the sum of l. being the dearest price he could get for the same; which monies he had before the barons of the king's *Exchequer* at *Westminster*, at the day in the said writ mentioned, ready to be paid to his majesty's use.

That as your petitioner has been at great expence in the said proceedings, and as his majesty is not con-

cerned in interest, but his name only made use of by your petitioner for the recovery of his said debt:

"Your petitioner therefore humbly prays your lordships, that his majesty's attorney general may be authorized to consent on behalf of his majesty, that the sum of £ l. may be paid to your petitioner towards satisfaction of his said debt and costs.

"And your petitioner shall ever pray," &c.

Certificate of
the clerk in
court.

"These are to certify that in term, in the year of the reign of his present majesty king George the third, a transcript of an outlawry was returned and filed in this court against C. D. late of, &c. merchant, outlawed in *Middlesex*, at the suit of A. B. in a plea of trespass on the case; by which transcript it does appear, that several goods and chattels of the said C. D. were seized into his majesty's hands by and Esq. then sheriff of the said county of *Middlesex*, by virtue of a special *capias utlagatum*, in the said transcript specified; And I further certify, that a writ of *venditioni exponas* has issued, for selling the said goods and chattels so seized, whereon the said sheriff hath returned, that he hath sold the same for the sum of £ l."

A. B. plaintiff,

In the King's Bench.

and

C. D. defendant.

Affidavit.

A. B. of, &c. maketh oath and faith, That the above-named C. D. is justly and truly indebted unto this deponent in the sum of according to the annexed account, and also in the further sum of 23^l. for costs paid to Mr. G. C. this deponent's solicitor, in prosecuting the outlawry in this cause against the said C. D.

The order for payment of the money, and the *sub-pœna*, are made out by the clerk in court.

Of Bail to the *Capias utlagatum*.

How to reverse
outlawries in all
cases but trea-
son and felony,
without appear-
ing in court.

By stat. 4 & 5 W. & M. c. 18. no person who shall be outlawed in this court for any matter, cause, or thing, (treason and felony only excepted,) shall be compelled to come in person in this court to reverse such outlawry; but he may appear by attorney, and reverse the same without bail in all cases (except when special bail shall be ordered by the court). And if

if any person outlawed shall be arrested on a *capias utlagatum* out of this court, the sheriff who hath taken such person (in all cases where special bail is not required by the court) may take an attorney's engagement under his hand to appear for the defendant, and to reverse the said outlawry, and discharge the defendant from such arrest; and where special bail is required, the sheriff may take security of defendant by bond with one or more surety in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court at the return for performing such things as shall be required; and after such bond taken, then to discharge him, *sect. 4.* Also where any person is arrested upon an outlawry, and cannot *within the return of the writ* give security as aforesaid, in cases where special bail is required, so as he be committed to gaol for default thereof, that whensoever he shall find security to the sheriff, for his appearance by attorney in the said court, at some return in the ensuing term, *to reverse such outlawry, and to do and perform such other thing and things as shall be required by the said court.* It shall be lawful for the sheriff after such security taken to discharge him; *sect. 5.* This act relates to cases where no special bail is required, and to cases where special bail is required; and the sheriff is directed what to do in either case; where the case is bailable, the defendant is to be discharged upon the security bond. But even in civil actions, he could not be bailed, where he was not bailable, he is only to be put in the same condition as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was not bailable before the outlawry, the act did not make such defendant bailable, who was not so before the outlawry. The concluding words of the security bond, "and to do and perform such things as shall be required by the said court," mean *putting in bail to a new action*, pleading within a limited time, putting the plaintiff in the same condition, and such like matters: Before this act, no bail could be taken on a *capias utlagatum*. Vide 13 Car. 2. stat. 2. c. 2. s. 4. *Rex v. Wilkes, 4 Burr. 2539.*

If the case originally required special bail, and defendant stands out to an outlawry, he cannot come

Special bail.

in and appear to the outlawry, without putting in *special bail*, and the filacer shall not issue a *superfedeas* till then. 3 Burr. 1920. *Campbell v. Daley*.

When bail,
though no affi-
davit.

If the *capias utlagatum* recites a special original specially expressing the cause of action, the sheriff must take bail, though the *capias utlagatum* is not marked for bail, 3 Burr. 1482. for process of outlawry is not within 12 Geo. 1. c. 29. for preventing frivolous and vexatious arrests; nor can defendant reverse the outlawry, without giving such bail as the law requires. *Ibid.* *Cracraft v. Gleddowne*.

Appearance be-
fore the quintus
exactus.

If the party defendant appears *before* he is returned outlawed, he does it upon the exigent (and if no bail is required in that case), he enters the appearance with the filacer, the same as upon a *special capias*, who thereupon makes out a *superfedeas* to the sheriff, to stay all further proceedings; pay signing 5s. 4d. seal 7d.

If bailable.

If it is bailable, then bail must be put in and perfected, by giving notice *two days* before, *exclusive*, to the plaintiff's attorney, of the names and places of abode of the bail, and the time of justifying; bespeak the book of the filacer, to go to *Westminster* for that purpose, who enters and takes the bail in the usual manner (though you may put in bail first at a judge's chambers, and give notice of justifying after); motion by counsel for that purpose 10s. 6d. *filacer* if put in at *Westminster* 1l. *aliter* at chambers 16s. 6d. and for the justification 7s. 6d. court fees 9s. rule for the allowance of the bail 4s. As soon as bail is complete, draw up the rule for the allowance, and the filacer makes out the *superfedeas*, which deliver to the sheriff, who returns the *allowance* upon the *exigent* in this manner:

Return.

"I have altogether ceased from executing this writ, having received his majesty's writ of *superfedeas* for that purpose." The answer of, &c. Pay the sheriff for the allowance 2s. 4d.

The filacer, if he goes to *Westminster*, charges 3s. 6d. for his attendance extra to put in bail, or justify.

How to put in
bail, to reverse
upon the *capias*
utlagatum, and
no arrest.

If it be upon *mesne* process (*and no bail required*), then upon entering a common appearance, leaving with him a memorandum or warrant on a 2s. 6d. stamp, with the filacer, and getting his certificate thereon, a judge at his chambers will grant an order to reverse the outlawry.

But

But if special bail is required (*upon perfecting same*), you may move the court to reverse the outlawry directly after justification; but if done after, *it must be moved, "on an affidavit made of perfecting the bail,"* and must be on payment of costs taxed.

Where bail is required, after it is put in, may move to reverse the outlawry.

If the person outlawed, at the time of the outlawry pronounced, was within the age of discretion, as if he was an infant under fifteen years, it may be avoided.

How avoided.

2 Roll. 805. Dy. 239. So if a woman at the time she is waived, was covert baron. 2 Roll. 806. So if a man, at the time of his outlawry, was in prison, it will be error. Lit. f. 437. 2 Roll. 803. But if by covin or consent, it will not avoid. Co. Lit. 259. b. If a man at the time of his outlawry was out of the realm, it will be error. Skin. 6. So in the king's service with a captain in war. 2 Roll. 803. So if out on his private business out of the realm. Ibid. 804. But not if he goes with intent to avoid process. Ibid. l. 30. And it may be avoided either by plea or writ of error. Co. Lit. 259. b. If for matter appearing on record, the party may reverse it by plea, Co. Lit. 529. b. or for omission of any process, *ibid.* or variance, *ibid.* But it is discretionary on motion: but generally, where the outlawry is avoidable for matter of fact, if not in felony, &c. it must be avoided by writ of error. *Ibid.*

The attorney general will not grant his *fiat* for the writ of error till defendant is in actual custody on the *cap. utlag.* 4 Burr. 2535. *Rex v. Wilkes for a misdemeanor.* Outlawing a man beyond sea is error, not irregularity. Barnes 319.

If the goods of the person outlawed be taken by the sheriff, and after the outlawry is reversed by writ of error, the defendant shall be restored to the goods again, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90. 1 Roll. Abr. 778. Cro. Eliz. 278. 2 Jon. 101. 5 Mod. 61.

If goods be taken, after reversal, defendant shall be restored to them.

He shall have all his lands and tenements though the king has granted them to another and his heirs. 1 And. 188. Cro. Eliz. 278. 2 Vern. 312. And he may enter upon the reversal without petition or *scire facias.* *Ibid.*

It is said, if the defendant ever lets the proceedings get into the Exchequer, although he reverses the outlawry

Goods seized into the king's hands, and the

proceedings are got into the Exchequer, in an outlawry, no restitution after reversal.

Defendant cannot be taken on a Sunday.

If error be brought for want of proclamation, the defendant must put in bail, not only to answer the plaintiff in the former suit, but to a new one.

Bail for condemnation.

No bail in error of an outlawry till reversal.

Where special bail is required on reversal of outlawry, although no affidavit be made previous.

lawry upon bail, yet they cannot make restitution; for that the court of *King's Bench* cannot send a writ to the treasurer, and the court of Exchequer have no record before them to issue out a warrant for restitution. 5 *Mod.* 61. It is said in the same book, that as soon as the writs are delivered to the officers of the Exchequer, viz. the treasurer, the property is altered, and the officers become debtors to the parties. 2 *H.* 7. *Ibid.*

The defendant cannot be taken on a Sunday upon a *capias utlagatum*, *Stat.* 29 *Car.* 2. c. 7. though the court will not attach the sheriff, but leave the defendant to his remedy given by the statute. *Barnes* 319.

Since the 4 & 5 *W. & M.* a writ of error to reverse the outlawry in civil cases, is seldom heard of. But before allowance of a writ of error, or reversing an outlawry, by plea or otherwise, for want of proclamations, the *stat.* 31 *El.* c. 3. f. 3. requires, that the defendant in the original action shall put in bail not only to appear and answer the plaintiff in the former suit in a new action to be commenced by him for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after allowance of the writ of error, or otherwise avoiding the said outlawry^a.

The bail are answerable in this case for the condemnation money. *Lee* C. J. 1 *Wils.* 3. *Serocole* v. *Hanson*. 1 *Salk.* 496.

Pending error to reverse an outlawry on mesne process, the defendant moved to quash the writ, because no bail was given. *Cur.* That is never done till the outlawry is reversed; and then we take bail to appear to an original to be brought within two terms, which was done. *Str.* 951. *Ducket* v. *Martin*.

The defendant was outlawed without affidavit of debt, and brought error, and assigned his being beyond sea at the time of the outlawry, which court reversed; but the question was, On what terms, whether on special or common bail? The court, on considering 4 & 5 *W. & M.* declared they had a discretionary power to require bail or not, and the want of an affidavit of the debt before the outlawry, was no objection, because that is only requisite to warrant an arrest; and here

^a The first process is determined by the outlawry, *Cro. Eliz.* 707. consequently the plaintiff cannot declare upon it, but must bring a new action.

was

was one in time for the new action that must be brought. And though 31 *Eliz.* is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is *absolutely to pay the condemnation.* *Serocold v. Hampson*, Str. 1178. Salk. 496. 1 *Wils.* 3.

The filacer used to take the bail in the common form *to render*, but this point was fully discussed in *E. T.* 31 *Geo.* 3. *Berwick v. Parking*, and in *Phillips v. Warburton*, *M. T.* 1785, where the court held, it should be bail on the 31 *El.* c. 3. s. 3. *to pay the condemnation money.*

How to obtain Error.

The curfitor makes out the writ of error *de coram vobis*, and it is allowed by the court on motion. If the plaintiff does not appear and confess the errors, the defendant must sue out a *sci. fa. ad audiendum errores*, and upon *two nibils* returned, the court will reverse the outlawry of course; but if he comes in, and does not confess the errors assigned, but joins in error, the defendant must make up the error-books, and go to argument and judgment as in other cases of error.

How to obtain the writ.

If a person procures another to be outlawed clandestinely, who appears in public, the court will oblige such person to reverse the same at his own costs, 12 *Mod.* 413.; but if it appears that the party outlawed had lurked backward and forward between two counties, and that the person had dealt openly, and been regular in sending proclamation to the sheriff where he sometimes resided, the court will not interpose in a summary manner, but leave the party to his ordinary remedy by plea, or writ of error. 2 *Vent.* 46. *T. Jon.* 211. *Comb.* 19.

Clandestine outlawry.

When the outlawry is reversed, the defendant may be discharged, if in custody, by *superfedeas*, 13 *Car.* 2. *stat.* 2. c. 2.; and his property, if taken into the king's hands, shall be restored to him by writ of *amoveas manus* or otherwise, according to the course of the Exchequer. *Cro. Eliz.* 278. 2 *Vern.* 312. *Bunb.* 105. 5 *Mod.* 61. For more of this, see my *Office of Sheriff*, 456.

When outlawry reversed.

The plaintiff cannot be nonprossed after the outlawry reversed, for *that writ* is become void. *Pract. Reg.* 271.

Nonpross.

Of

Of declaring after Outlawry.

Cro. Eliz. 707.

A new original must be sued out, the former being at an end after outlawry pronounced, for defendant undertakes to put in bail to a new original to be sued out within two terms. *Stat. 31 El. c. 3. f. 3.*

The declaration has no need to be laid in the same county in which the former *original* was made. *3 Lev. 245.*

If defendant be outlawed, and shall reverse the same, the plaintiff may commence a new action within a year after such judgment of outlawry reversed, and not after.

Superfeding the exigent, a declaration delivered, there must be a rule to plead given.

By the 21 *Jac. 2. c. 16. f. 4.* it is enacted, That if in any action brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, *within a year after such judgment of outlawry reversed*, and not after.

Upon superseding the exigent, if plaintiff delivers a declaration, there should be a notice to plead, and a rule given, before judgment can be signed; and defendant has in such case the same time to plead as in other cases.

Outlawry after Judgment.

Process of outlawry lies on a *special original* only, and not where the proceedings are by bill. If you have judgment *by original* against a man that lurks in several counties, in regard you cannot regularly have execution against him in more counties than one at a time, the best way is to sue him to outlawry after judgment, for then you may take out as many writs of *capias utlagatum* against him as you please, and this for a small charge; besides, it saves the charge of reviving the judgment by *scire facias* after the year and day, and you may have an *exigent* immediately after the return of the *ca. sa.* without an *alias* and *pluries*, and also without a writ of proclamation. *Cro. Jac. 677.*

The method.

First, sue out a *ca. sa.* for the debt and costs, as the case is, into the same county where the action was laid, and get *non est inventus* returned by the sheriff; then carry same to the filacer, who will make an *exigent* thereupon, which deliver to the under-sheriff, to be returned as other *exigents* are.

The *exigent* being returned, the filacer will make out a *capias utlagatum* into as many several counties as you

you will, either in *England* or *Wales*, general or special; and if the defendant be taken, he cannot be discharged without reversing the same for sufficient error, or making satisfaction.

It seems if a *capias utlagatum* issue after judgment, the defendant is not bailable. 4 *Burr.* 2540.

Infants.

BY the common law, a male or female is called an infant till the age of twenty-one years. *Co. Lit.* 171. b.; but by the civil law the age of seventeen years. *Ibid.*

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *Co. Litt.* 172. a. And if he brings the materials to the taylor, there is no need to aver that they were suitable to his quality. *Lat.* 157. Necessaries for an infant's wife, are necessities for him, but not if provided in order for the marriage, *Str.* 168.; and upon such contract by an infant, an *assumpsit* lies. *Lat.* 197. *Jon.* 146. *Pal.* 528. Or, if he gives a single bill for money upon such contract, it binds him. 1 *Roll.* 729. l. 20. *Cro. Eliz.* 920. 1 *Lev.* 86. The court will judge what things are necessary. *Cro. Eliz.* 583. If goods not necessary are delivered to an infant, who after full age promises to pay, he is bound. *Str.* 690. An infant shall be charged for a trespass done by him. *Com. Dig.* 3 V. 170. So an infant of seventeen years of age shall be charged for malicious words. *Noy* 129.

In what cases he is liable, and what not.

If a warrant of attorney be given by an infant and another, and judgment is entered up thereon, the court, on motion, will order the name of the infant to be struck out of the warrant of attorney, and set aside the judgment as against him. 2 *Black. Rep.* 1133. Vide *Str.* 1043.

If warrant of attorney be given by infant, and judgment thereon.

An infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*, which is next friend; but he cannot defend by such next friend,

How to prosecute and defend.

friend, but must defend only by guardian, because the law supposes, that where he demands or sues for any thing, it is for his benefit. And the power for infants to sue by *prochein amy*, was first introduced by the *stat. West. 2.*

If joined by others in suing in right of another, may be brought by attorney.

Infant defendant, in all cases must defend by guardian.

If he sue by attorney.

If defendant.

If attorney undertakes to appear, he must do it by guardian.

How plaintiff is to apply.

Before declaration, a guardian must be appointed.

If an infant be joined with others, in suing in the right of another, the action may be brought by attorney; for they all make but one person in law. 3 *Cro.* 377.

But in all cases where an infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. 2 *Cro.* 289. 1 *Lev.* 294.

If an infant plaintiff sue by attorney, and there be a verdict for him, it is not error. *Stat.* 21 *Jac.* 1. c. 13. And this now is extended to judgment by default. 4 & 5 *Ann.* c. 16. s. 2. *Jenk.* 301. pl. 68. *Bulstr.* 24. But if he be defendant, and appears by attorney, it is error. 8 *Co.* 58. b. 9 *Co.* 30. b. *Cro. El.* 569.

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended and made *per guardianum*. *Str.* 114. 445.

Plaintiff's attorney should apply to defendant to name a guardian; and if he does not in six days, apply to the court to oblige him to do it. 2 *Wils.* 50.

The writ may be served at the suit of the infant, but, before declaration, a guardian must be appointed by the court, which is done either by taking the guardian and infant before a judge at his chambers, or by petition; if by petition, it is thus:

In the King's Bench.

Between

{ A. B. the younger, plaintiff,
and
C. D. defendant.

Petition to assign a guardian.

To the Right Honourable Lloyd Lord Kenyon, Lord Chief Justice of England.

The humble petition of A. B. the younger, an infant, under the age of twenty-one years, the plaintiff in this cause,

Sheweth,

N. B. To be engrossed on a 2s. stamp paper.

That your petitioner has, as he is advised, good cause of action against the above-named C. D. for assaulting and beating your petitioner, and that your petitioner has commenced an action against the said C. D.

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C. D. for the same ; but in regard that your petitioner is an infant under the age of 21 years,

Your petitioner, therefore, most humbly prays your *lordship*, to assign unto him *G. F.* of, &c. merchant, your petitioner's father, as and for your petitioner's guardian, to prosecute the said action against the said *C. D.*

And your petitioner shall ever pray, &c.

Underneath which petition write the following acceptance :

" I do hereby agree to accept to be the guardian to the above-named *A. B.* an infant, according to the prayer of the above petition. *G. F.*

" Witness, *J. G.* attorney for the plaintiff."

To which annex the following affidavit sworn before a judge :

A. B. the younger, plaintiff,
and
C. D. defendant.
In the King's Bench.

J. G. of, &c. gentleman, attorney for the plaintiff in this cause, maketh oath and faith, That *A. B.* the above-named plaintiff, did, on the day of To be engrossed on 2s. stamp paper,
duly sign the petition hereunto annexed, in the presence of this deponent ; and this deponent further faith, that he was also present, and did see *G. F.* the person mentioned in the said petition, duly sign the acceptance or agreement thereunder written, in order to his being a guardian to the said *A. B.* the younger.

Take the petition and affidavit to the judge's chambers, who will thereupon make his order for plaintiff to prosecute by his guardian, pay 12s. take same to the clerk of the rules for a rule thereon, pay 5s. and when you declare, annex a copy of the rule to the declaration. How to proceed.

One admission will do, to prosecute and defend all actions that may be in suit. One admission will do.

London, (s.) *A. B.* by *G. F.* who is admitted by the court of our lord the king, before the king himself here, to prosecute for the said *A. B.* who is within the age of twenty-one years, as the next friend of the said *A. B.* complains of (as in other cases). The form of the declaration.

In the issue, say in the memorandum (" comes *A. B.* issue, " who is admitted by the court of our lord the king, before the king himself here to prosecute,") as before.

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friend, but must defend only by guardian, because the law supposes, that where he demands or sues for any thing, it is for his benefit. And the power for infants to sue by *prochein amy*, was first introduced by the *stat. West. 2.*

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Your petitioner, therefore, most humbly prays your *lordship*, to assign unto him *G. F.* of, &c. merchant, your petitioner's father, as and for your petitioner's guardian, to prosecute the said action against the said *C. D.*

And your petitioner shall ever pray, &c.

Underneath which petition write the following acceptance :

" I do hereby agree to accept to be the guardian to the above-named *A. B.* an infant, according to the prayer of the above petition. *G. F.*

" Witness, *J. G.* attorney for the plaintiff."

To which annex the following affidavit sworn before a judge :

A. B. the younger, plaintiff,

In the King's Bench.

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C. D. defendant.

J. G. of, &c. gentleman, attorney for the plaintiff in this cause, maketh oath and faith, That *A. B.* the above-named plaintiff, did, on the _____ day of _____ To be engrossed on 2s. stamp paper,
duly sign the petition hereunto annexed, in the presence of this deponent ; and this deponent further faith, that he was also present, and did see *G. F.* the person mentioned in the said petition, duly sign the acceptance or agreement thereunder written, in order to his being a guardian to the said *A. B.* the younger.

Take the petition and affidavit to the judge's chambers, who will thereupon make his order for plaintiff to prosecute by his guardian, pay 12s. take same to the clerk of the rules for a rule thereon, pay 5s. and when you declare, annex a copy of the rule to the declaration. How to proceed.

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In the issue, say in the memorandum (" comes *A. B.* who is admitted by the court of our lord the king, before the king himself here to prosecute,") as before. Issue.

Qo

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Venire and distringas.

Infants defending.

If he appear and plead by attorney.

In the *venire* and *distringas*, say, "*A. B. by his next friend, plaintiff.*"

An infant cannot defend without a guardian if he is sued, nor can he plead (till a guardian is admitted by some judge of the court). *St. Pr. Reg.* 265.

But if he appear and plead by an attorney, and the plaintiff finds it out, he may in vacation time apply to a judge for a summons (or in term to the court), for a rule to shew cause "*why common bail filed should not be struck out, and the plea be set aside, and that the defendant may be obliged to appear by a guardian;*" and if no one is named within six days, the plaintiff may name one for him, which will be ordered of course. *Vide Str.* 1076.

In the *K. B.*

A. B. against *C. D.*

To the Right Honorable Lloyd Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench.

The humble petition of *C. D.* the above defendant, an infant under the age of twenty-one years.

Sheweth,

Petition to assign a guardian to defend.

That the above plaintiff hath lately commenced an action at law against your petitioner in this honorable court, for (here set forth the cause of action), and your petitioner is advised and believes that he has a good defence to make thereto; but in regard your petitioner is an infant,

Your petitioner humbly prays your lordship would be pleased to assign *G. H.* of, &c. as his guardian, to defend this suit.

"*And your petitioner shall ever pray.*" *C. D.*

I do accept and agree to be the guardian of the said C. D. an infant, according to the prayer of the above petition. *G. H.*

"*Witness J. G.*"

Affidavit of the signing by the infant, and the acceptance of the guardian, is requisite in this case.

In case the guardian appear before the judge's clerk, there is no necessity for an affidavit of his acceptance; pay 12s. rule 5s.

The infant must file common bail by his guardian at the suit of the plaintiff.

Annex

Annex the copy of the rule to the plea, or serve a copy on plaintiff's attorney: plea to be filed.

And the said *C. D.* by *G. H.* who is admitted by the court of our lord the king here, to defend for the said *C. D.* who is under the age of twenty-one years, comes and defends the wrong and injury, when, &c. says, that he the said *C.* at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of twenty-one years, to wit, of the age of nineteen years, and no more, to wit, at *London* aforesaid, &c. and this he is ready to verify; wherefore he prays judgment if the said *A.* ought to have or maintain his aforesaid action thereof against him, &c.

Plea of infancy per guardian.

J. G.

If defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the process, and that the defendant is an infant, and that he hath not appeared; upon which the judge, without taking out a summons, will make an order, "*That unless the infant appears within so many days after personal service of the order, plaintiff may assign John Doe for guardian, and enter appearance for defendant;*" and upon affidavit of the service of this order, the judge will make the order absolute, and then an admission is drawn up and filed as aforesaid. Vide *Str.* 1076. *Stone v. Atwell.*

If infant does not appear by guardian, how plaintiff is to proceed.

It is said the infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable, *Str.* 548. ^a *James v. Hasfield, Barnes* 128. *Cro. El.* 33. *2 Str.* 708. *Cro. Jac.* 640.; and if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But an infant defendant (although he names a guardian) is liable to costs, if the verdict be against him. *Dy.* 104. *1 Bulstr.* 109. *Str.* 708.

Infant plaintiff not liable to costs, but *prochein amy*, &c.

The costs must be demanded of plaintiff's next friend, and on refusal, you may move for an attachment on an affidavit of the facts.

Infant defendant is liable, although he names a guardian. Costs to be demanded.

If the plaintiff reply to a plea of infancy, that the defendant after he had attained twenty-one confirmed

Confirmation of a promise.

^a Yet it appears, that an infant plaintiff was taken in execution for the costs, and court refused to discharge him on motion. *2 Str.* 1277. *Galliner v. Holt. Per Cur.* If costs cannot be given, it will be matter of error to be insisted on.

the promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *1 Term Rep. 648. Borthwick v. Carruthers.*

Statute of Limitations. P. 29.

TO save the statute of limitations, it is proper for the plaintiff to commence a suit, by actually suing out process against the defendant; and such process must be sued out before the time expires; for it will not do by relation, for the defendant may in his rejoinder, set out the *true time* on which it issued. *1 Black. Rep. 215. Ld. Ray. 432*; and if it be against an attorney, a bill may be filed in vacation. *Doug. 313*. So an original may be issued in vacation against a peer or member. *Salk. 512. Ld. Ray. 1113*.

The statute never begins to run against a plaintiff who is a foreigner, until he comes into this realm.

If the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still six years after his coming into *England*, to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Strithers v. Græme, 3 Wils. 145*.

A bill of Middlesex or latitat may be sued,

A bill of *Middlesex* or *latitat*, in the first instance, may be sued out in order to save the statute of limitations, which being done, take same to the sheriff for a return of *non est inventus*, then enter the same on a roll, as of *the term in which the writ is returnable*, thus:

As yet of the term of Easter, 36 Geo. the 3d, 1796. Witness Lloyd Lord Kenyon.

Entry of a bill of Middlesex.

Middlesex, } The sheriff is commanded to take *C. D.* to wit. } and *John Doe*, if they may be found in his bailiwick, and them safely keep, so that he may have their bodies before the lord the king at *Westminster* on *Wednesday* next after fifteen days of *Easter*, to answer *A. B.* in a plea of trespass, and that he then have there this precept. By bill.

Appearance of the plaintiff, and sheriff's return thereon.

Mansfield and Wey.
At which day before our lord the king at *Westminster* came the said *A. B.* in his proper person, and offer-

ed himself against the said *C. D.* in the plea aforesaid, and the sheriff, to wit esq. and

esq. sheriff of the said county, returned that the said *C. D.* was not found in his bailiwick.

* Take the roll and writ to the clerk of the judgments, who will enter the same, and mark the writ, pay 2s. carry in the roll, and file the writ in the treasury.

Middlesex, (fs.) Entry of a bill of *Middlesex* between *A. B.* plaintiff, and *C. D.* defendant, returnable on, &c. *Roll. 56.* Docket.

This entry will serve for the *latitat*, enter it verbatim, *George* the third, &c. to the end, *Mansfield* and *Way*; it will also serve for an attachment of privilege.

By taking out the bill of *Middlesex*, &c. in this manner before the end of the six years, there is no necessity of doing it again, nor is there any occasion to declare thereon pursuant to the rules of court at the

end of two terms. 2 *Vern.* 192. For when you come to arrest defendant, and he pleads the statute, it may be continued till the suing out of the new process, which must be shewn in the replication; averring at the end thereof, *that the first process sued out and returned, was sued out with a view to exhibit his bill, or declare*

for the same identical cause of action; and that the same was sued out within the time limited by the statute. For it may be continued when you sue again. Averment in the replication.

Entry of Satisfaction. P. 51.

SATISFACTION being obtained of any judgment, an entry on the record ought regularly to be made to discharge the same, or the judgment apparently continues in force against the party convicted thereon. And for this purpose, the party making satisfaction may demand of the other a warrant or authority from him, directed to some attorney of the court wherein the judgment is recovered, authorising such attorney to enter up satisfaction; the warrant may be had ready

The judgment roll must be filed, or this cannot be done.

* If the writ be produced to shew it was sued out to save the statute, the plaintiff must also shew it has been returned by the sheriff. *Harris v. Woolford, 6 Term Rep. 617.* So if an *alias* be produced, the *first* writ must be returned and shewn. *Vide 2 Ld. Ray. 883. 7 Mod. 3.*

printed at the stationers, which is done in the following manner: Write the satisfaction piece on a slip of unstamped parchment, in the form of a bail-piece, thus:

Satisfaction
piece.

Easter Term in the 36th year of the reign of
king *George III.* *Mansfield and Way.*

Middlesex, (fs.) Satisfaction is acknowledged between *A. B.* plaintiff, and *C. D.* defendant, in a plea of debt (or as the case is) for 1000*l.* debt, and 63*s.* damages.

J. G. attorney.

Judgment entered of
Easter Term, 35 Geo. 3.
Roll. 860.

Take this and the warrant of attorney executed to the clerk of the judgments, pay him 3*s.* for the entry, if in term; in vacation 5*s.* 10*d.* more for the keys of the treasury, and 3*s.* 4*d.* attendance.

Ejectment.

THIS is a *possessory action*, grounded on a right to the possession of the premises in question between the parties; in which action almost all titles to lands are now generally tried, and that whether the title be to an estate in fee, fee tail, for life, or for years. And the courts now go to the utmost extent in support of ejectments, that people may have specific remedies for their rights. And it was formerly usual for those who had a right of entry into lands, to seal leases thereon, and then the person who next entered on the freehold, was deemed an ejector. And the convenience which arose from this method was, that the title could be tried *toties quoties*; whereas if the plaintiff was barred in an assize, he was put to his writ of right. 6 *Co.* 7. *b.*

But the court would not permit men to be deprived of their possessions, without an opportunity of defending them. To effect which purpose, they interposed their

their authority, by establishing a rule, that no plaintiff should proceed in ejectment against such a casual and titular ejector, without delivering a declaration to the tenant in possession, and making him an ejector and proper defendant if he pleased, and that he should not have judgment against the casual ejector, unless an affidavit was made, that the tenant was served with a copy of the declaration.

An *ejectment* is an *ingenious fiction*, for the trial of titles to the possession of land. In form it is a *trick* between two, to dispossess a *third* by a sham suit and judgment. The artifice would be criminal, unless the court converted it into a *fair* trial with the *proper* party. The control the court have over the judgment against the casual ejector, enables them to put any terms upon the plaintiff, which are *just*. When the tenant in possession *asked* to be admitted defendant, the court was enabled to add conditions; and therefore obliged him to *allow* the fiction, and go to trial upon the *real merits*. 2 Burr. 1294. *Fairclaim v. Shamtitle*.

This action is an invention by the court (though fictitious) for the advancement of justice, and to force the parties to go to trial upon the merits, without being entangled in the nicety of pleading on either side. 2 Burr. 668. The nature of the action.

The plaintiff and defendant are, in the first instance, merely nominal, *where there is a tenant in possession*; and the *lessor* of the plaintiff and the *tenant in possession*, are substantially and in truth the parties to the suit. *Ibid*.

The great advantage of this fictitious mode is, that being under the control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience.

Public utility has adopted it in *lieu* of almost all *real actions*; which were embarrassed and entangled with a thousand niceties. But as there was good and bad in the method of real actions, the good ought to be grafted into ejectments, in such manner as to avoid the bad. 3 Burr. 1296. *Fairclaim v. Shamtitle*.

An ejectment is a *possessory* remedy, and only competent where the lessor of the plaintiff may enter: therefore it is always necessary for the plaintiff to shew that his lessor had a *right to enter*; by proving a *possession*. A possessory action.

possession within 20 years, or accounting for the want of it under some exceptions allowed by the statute. Twenty years adverse possession, is a positive title to the defendant; it is not a bar to the action, or remedy of the plaintiff only, but takes away his right of possession. 1 Burr. 119. Taylor v. Atkins. Every plaintiff must shew a right of possession, as well as of property, and therefore the defendant needs not plead the statute, as in the case of actions. *Ibid.*

Lease, entry, and ouster.

The confession of lease, entry, and ouster is sufficient to bar a nonsuit for want of proof of actual entry. The meaning of it is, to bring the matter to the mere question of the plaintiff's possessory title. But to avoid a fine, there must be an actual entry, and the demise cannot be carried beyond the actual entry. In all other cases it is sufficient. *Gates v. Wigfall, 3 Burr. 1897.*

Fine.

The formal title of a trustee shall not in an ejectment be set up against the *cestuy que trust*; because from the nature of the two rights, the *cestuy que trust* is to have the possession. *Armstrong v. Piers, 3 Burr. 1901.*

If recovery, damages nominal.

If the lessor make out his title to the premises, he shall have judgment to recover his term stated in the declaration and damages which are nominal, and shall in consequence have a writ of possession, which the sheriff is to execute by delivering him the peaceable possession thereof.

Real damages are afterwards recovered.

The real damages are afterwards recovered in an action of trespass for the mesne profits, which the tenant has wrongfully received, and which will hereafter be fully treated on.

No distinction between judgment in ejectment on a verdict, and by default.

There is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the last case, it is confessed. *2 Burr. 668.*

Must recover according to title.

The plaintiff must recover according to the title. If she demands a half, and she appears to have a third

a "I do here enter and take possession of the house," if door be open; if shut, set foot on the ground or against the door, and say same words; if to enter on land, "I here enter and take possession of this land." There must be a witness present. *1 Lill. P. R. 697.* The delivery of a declaration does not amount to an entry to avoid a fine. *1 Saund. 319.* An entry upon part of the land is an entry into the house. *Cro. Eliz. 188. pl. 16.* and the action must be commenced within a year after entry. *4 & 5 Ann. c. 16. s. 2.* ejectment served,

only,

only, she shall recover for such third. If she demands 40 acres, she may recover 20. *Denn v. Purvis*, 1 Burr. 329.

Where an ejectment is brought, there can be no *disseisin*; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to the making the lease; but there is *no real* or supposed *re-entry*, after the ejectment complained of. If it was considered as a *disseisin*, no *mesne profits* could be recovered, without an *actual* re-entry. *Taylor v. Herde*, 1 Burr. 111.

No disseisin.

A judgment in ejectment is the recovery of the *possession* (not of the *seisin* or *freehold*) without prejudice to the *right*, as it may afterwards appear between the parties. He who enters under it in truth and substance, can only be *possessed according to right*, *prout lex postulat*. *Ibid.* 114.

Judgment in ejectment is recovery of possession.

If lessor has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures *according to right*. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits. *Ibid.*

If lessor has a freehold, &c.

If no title.

It is competent to the defendant to shew that the lessor's title has expired, and that he has no right to turn him out of possession.

Defendant to shew title expired.

How to proceed on a vacant Possession.

Where a house or land is empty, and the person who was *last* in possession is run away, so that you cannot find any person to deliver the declaration to, then you must proceed the old way, by sealing a lease on the premises, and give rule to plead, &c. 1 *Lill. Pract. Reg.* 675. *Sty. Pr. Reg.* 198.

If house or land empty.

It seems, that to warrant these proceedings, the premises must be entirely *vacant*, *deserted* by the *tenant*, and that the *landlord* is not able to find him to serve the ejectment.

The lessor of a public house took another, and removed his goods and family, but *left beer* in the *cellar*; the attorney *knew* where the lessor *removed to*, and might have served him *personally*; there being rent in arrear for the public house, landlord settled a lease as on a vacant possession, delivered an ejectment, and signed judgment.

Leaving beer in a cellar, is keeping possession by the tenants.

So hay.

Land.

How to proceed,
if no tenant in
possession (except
under the 4 Geo.
2).

How to deliver
the lease.

Explanation.

The form of the
letter of attor-
ney, if requisite.

judgment. The court set the judgment aside, holding the lessee still continued in possession. And a case was mentioned, where the leaving hay in a barn, at *Hendon*, was held to be keeping possession. And in the case of renting ground, to which there is no house or barn, if it is known where the tenant *lives*, he must be served. *Savage v. Dent*, 2 Str. 1064.

If there be no actual tenant or occupier of the lands, (*except in the case of landlord and tenant, where the landlord has a right of re-entry as upon a lease, where half a year's rent is left unpaid,*) the mode of proceeding will be by sealing a lease on the premises; and it is first necessary that the claimant do take possession of the lands, by making a formal entry thereon, to empower him to constitute a lessee for years; and being in possession of the soil, he, there on the land, seals and delivers a lease for years to such lessee, and having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him, or till some other (either by accident or agreement beforehand) comes upon the land, and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or the casual ejector, whichever it was that ousted him, to recover back his term and damages.

Supposing *A.* to be the person claiming title to the premises, he may, if he pleases, sign the following letter of attorney to empower *D.* to execute a lease in his name, of the premises in question, to *E. F.* which is done upon the premises, *D.* and *E. F.* being only thereon; then *D.* after having executed his lease to *E. F.* leaves him in possession of the premises, who is turned out by *G. H.* to whom, whilst on the premises, *E.* delivers a declaration in ejectment.

Know all men by these presents, that I A. B. of, &c. gentleman, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint C. D. of, &c. hofier, to be my true and lawful attorney, for me, and in my name to enter into and take possession of a certain messuage late in the tenure and occupation of G. F. and J. H. situate and being in the parish of, &c. in the county of Oxford, but now untenanted, and after the said
C. D.

C. D. hath taken possession thereof, for me, and in my name, and as my act and deed; to sign, seal, and execute a lease of the said premises, with the appurtenances, unto *E. F.* of the parish of, &c. malster, to hold the same unto the said *E. F.* his executors, administrators, and assigns, from the day of

last past, before the date hereof, for the term of five years, at the yearly rent of a pepper-corn (if lawfully demanded), subject to a proviso, to make void the same on payment by me of the sum of sixpence to the said *E. F.* In witness, &c.

Sealed and delivered, &c.

This indenture made, &c. between A. B. of, &c. The lease.
gentleman, of the one part, and *E. F.* of, &c. of the other part, witnesseth, That the said *A. B.* for and in consideration of the sum of 5s. of lawful money of *Great Britain*, to him in hand paid by the said *E. F.* at or before the sealing and delivery of these presents, the receipt whereof the said *A. B.* doth hereby acknowledge, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said *E. F.* his executors and administrators, all that messuage, &c. situate and being in the parish of in the county of *Oxford*, late in the possession of *G. F.* but now untenanted, to have and to hold the said messuage and premises hereby demised, with the appurtenances, from the day of last past, before the date hereof, for and during, and unto the full end and term of five years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore yearly and every year during the said term, unto the said *A. B.* or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast of

Provided always, and upon this condition, that if the said *A. B.* shall at any time or times hereafter tender or cause to be tendered to the said *E. F.* his executors or administrators, the sum of 6d. that then this present indenture shall be void, and of none effect (any thing herein contained to the contrary in anywise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals the day and year first above written.

Sealed

EJECTMENT.

Sealed and delivered as the act and deed of the above-named *A. B.* by *C. D.* of _____ in the county of _____ hofier, by virtue of a letter of attorney to him for that purpose made by the said *A. B.* bearing date the _____ day of _____ instant, being first duly stamped in the presence of _____

If no Letter of Attorney be made.

If no letter of attorney, how to seal the lease.

If there be no letter of attorney made, then the owner of the land must go upon it, before the *effoign-day of the term*, and there seal and deliver a lease to a friend of his as tenant, and at the same time deliver him possession of the premises. This being done, get another person (a friend) to go upon the premises, and turn out the tenant, by thrusting him off the premises, and afterwards let such ejector remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make the tenant or lessee the *plaintiff*, the landlord the *lessor*, and the actual ejector the *defendant*, and to declare on the demise in the lease, and write a notice at the foot of the declaration, to appear and plead as hereafter.

Declaration.

The declaration is the same as others, only instead of *John Doe* and *Richard Roe*, the plaintiff and defendant are, in this case, the *real persons*; as for instance, *E. F.* the lessee of the premises, will be *plaintiff*, and *G. H.* the *defendant*; *A. B.* will be the lessor of the plaintiff; and instead of the common notice at the end, put this:

Notice to appear.
If in town, say,
“first day of.”

Take notice, that unless you appear in his Majesty's court of King's Bench at *Westminster next Trinity term*, at the suit of the above-named plaintiff, *E. F.* and plead to this declaration in ejectment, judgment will be thereon entered against you by default.
Yours, &c. *G. H.*

After service, make the following affidavit of executing the letter of attorney, of *sealing the lease*, and the *ouster* by the defendant:

E. F. on the demise of *A. B.* plaintiff.
In the King's Bench. and
G. H. defendant

Affidavit.

J. K. of, &c. gentleman, maketh oath, and saith,
That on the _____ day of _____ last, he did see
C. D.

C. D. in the letter of attorney hereto annexed, for and in the name of *A. B.* the lessor of the plaintiff, enter upon and take possession of the messuage ^a in the lease hereto also annexed mentioned, by entering on the threshold of the outer door thereof, and putting his finger into the key-hole of the door of the said messuage, the same being locked up and uninhabited, so that no other entry thereon could be made, or any possession thereof taken, without force. And this deponent further saith, That he did, on the same day, see the above-named *C. D.* after such entry made, and whilst he stood on the threshold of the said door, duly sign, seal, and deliver the lease hereunto annexed, in the name of the said *A. B.* and as his act and deed deliver the same unto the said *E. F.* the plaintiff above named; and that after the said lease was so executed, this deponent did see the said *E. F.* take possession thereof by virtue of the said lease, by entering upon the threshold of the said outer door of the said messuage, and putting his finger into the key-hole thereof (the same being then locked and uninhabited), and no other entry to be made therein (save as aforesaid), and that immediately afterwards the said *G. H.* the defendant came and removed the said *E. F.* from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant *G. H.* who still continued upon the threshold of the said messuage, a true copy of the declaration of ejectment, and notice thereunder written hereto annexed.

After this is sworn, indorse it, "*to move for judgment* Moving for judgment. *against the casual ejector,*" and unless the defendant appears and enters into the common rule, sign judgment, as on a common ejectment, counsel 10s. 6d. to move, rule for judgment 5s.

In cases of a vacant possession, no person claiming title will be let in to defend, but he that can first seal a lease, must obtain possession, *Bull.* 96. *Barn.* 177.; and no defence can be made but by the *defendant* who is the *real ejector*, and the landlord was refused. *Ibid.* In my 5th edition I have said the contrary, 537.

^a If there be more houses than one, then you must go to each house, and seal and deliver the lease.

Of Notice to quit previous to Ejectment.

When notice to
quit requisite,
and when not.

Where the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where *no certain term* is mentioned, are held to be tenancies from year to year, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, *six months* preceding after that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession, must be given to such tenant, before the end of which time the landlord cannot maintain an ejectment (unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant, in which case no notice is necessary). And the same law will apply to the executor of such a tenant, 3 *Wils.* 25. But *after the expiration of a lease for a certain term*, the tenant continuing in possession is deemed a trespassor; and therefore an ejectment, which is an action of trespass, may be brought *without any notice to quit*. Vide *Proceedings by a Mortgagee*.

When no notice
is requisite.

I desire you to
quit, &c. or
shall insist upon
double rent,
good notice.

On a motion for a new trial in ejectment, the case turned on the sufficiency of the notice to quit, which was as follows: "*I desire you to quit the possession, at Lady-day next, &c. or I shall insist upon double rent for the same.*" Verdict for plaintiff. It was contended on the part of the defendant, that the notice was conditional, and that it was therefore optional in the defendant either to quit, or keep possession on the payment of double rent. Lord *Mansfield* said, it clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords; for double rent would be no penalty on the expiration of some leases. The additional words only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he held over. *Doe v. Jackson and others*, *Dougl. Rep.* 167.

When double
rent,

If a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, he is entitled

entitled to double rent. *Messenger v. Armstrong*, 1 Term Rep. 53.

By the custom of London, if the premises are above the yearly rent of 40s. half a year's notice must be given to quit; if under 40s. a quarter's notice. 2 Sid. 20. Custom of London.

Defendant held from Michaelmas, and he was served with notice to quit at Midsummer; but when he received this notice, he made no objection that it required him to quit at that period of the year, but merely said, "I pay rent enough already, and it is hard to use me thus." Verdict for plaintiff. Motion to set it aside: Court were of opinion, that the defendant had not waived the objection, and made rule absolute to enter a nonsuit, as the verdict was taken with liberty to move to set it aside, and enter a nonsuit. *Oak-apple dem. Green v. Copous*, 4 Term Rep. 361. Insufficiency of notice may be made at trial.

In the case of a tenancy from year to year as long as both parties pleased, if the tenant die intestate, his administrator has the same interest in the land which his intestate had: and the lessee of such an administrator may declare on an ejectment on a term for seven years. *Doe on dem. Shore v. Porter*, 3 Term Rep. 13. *Buller* 106. Administrator.

Lessor seized in fee of the premises in question. On 11th May 1781, defendant took the house from that time, under a parol demise at 10l. per annum, the rent to commence at Midsummer following. The defendant Darby let part to defendant Bristow: 26th March 1785, the defendant Darby was served with notice to quit on the 29th September following. Ejectment brought, and verdict for the plaintiff, subject to the opinion of the court.—Question, Whether the rule, which requires that half a year's notice should be given to a tenant at will before ejectment can be brought, requires also, that such notice should expire at the end of the year? Lord Mansfield—When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary; because both parties are equally apprized of the determination of the term. If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year: but then it is necessary, for the sake of convenience, that if either In the case of tenancy from year to year there must be half a year's notice to quit, ending at the expiration of the year.

Lease determinable, &c. no notice.

party should be inclined to change his mind, he should give the other half a year's notice before the *expiration of the next or any following year*. As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement may be for a month or less time, and there much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. Mr. J. Buller—There should have been half a year's notice to quit before the end of the term. *Right v. Darby*, 1 Term Rep. 160. Judg. for defend. Vide 2 Salk. 413, 13 H. 8. 15. b. It seems if upon the expiration of a lease, the tenant in possession receives no intimation from his landlord, that the tenancy is to cease, he is warranted in holding over, and becomes tenant from year to year, and is entitled to *notice to quit*.

If on expiration of lease, no intimation be given, &c.

Infant to give notice.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given, 2 Term Rep. 159. *Madrox v. White and others*.

Notice delivered to servant at the dwelling of tenant, and explained at the time, is good, without shewing it came to the master.

On trial of ejectment before Heath J. it was admitted, that defendant was tenant from year to year to lessor, and the question was, whether he had been served with due notice to quit? It appeared that the notice had been served on his *maid servant at his house not situated on the demised premises*, and the contents explained to her at that time: but there was no evidence that it ever came to defendant's hands, except as above. A nonsuit was entered, with leave to move to set it aside. Lord Kenyon—This is different from the cases of personal process. If an ejectment be served on the wife in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the legislature has enacted, that before a party shall be effected by any acts, notice shall be given to him, leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed; and indeed in some instances of process, leaving it at the house is sufficient, as a *subpoena* or *quo minus*. In general the difference is between process to bring the party into contempt, and a notice of this kind; the former

former of which only need be personally served on him. *Buller J. Ex-concissis* personal service is not necessary in all cases, it was proved that this notice was delivered to the tenant's servant at the dwelling-house of the tenant, and its contents were explained at the time; and that servant, who was in the power of the defendant, was not called to prove that she did not communicate the notice to her master, this was ample evidence on which the jury would have presumed that the notice reached the tenant. *Rule abs. Jones dem. Griffiths v. March, 4 Term Rep. 464.*

For what an Ejectment lies.

Ejectment lies for a manor, messuage, so many acres of land, meadow, pasture, wood, &c. 11 Co. 55. So *de una domo*, 2 Cro. 654. *de cotagio*, Cro. Eliz. 818. *de coquina*, Noy 109. *de stabulo*, 1 Lev. 58. *de romea*, 3 Leo. 210. of the part of a house, if it appear what part, Str. 695 of part, as *locum vocatum* a passage room, and ascertained in what part, Lord Raym. 1470. of a close of pasture called five acres, containing five acres, *Ibid.* of tithes, and *portione decimarum*, Hard. 57. of pasture for one hundred sheep. Dal. 95. For common of pasture generally, if joined with lands, will be good after verdict. Str. 54. Of a coal mine. 2 Cro. 150. It lies by the owner of the soil for land, part of the highway. 1 Burr. 133. Land is a sufficient description, though part of a house is built by encroachment upon it, for plaintiff claims the land not the nuisance. *Ibid.* For a messuage, garden, and tenement. Str. 834. For one messuage or tenement. 3 Wils. 23. 3 Mod. 328. 1 Sid. 295. Of a kitchen, Noy 109. a bed-chamber or lodging-room, by the name of one room in such a house, in the middle story of the said house, 3 Lev. 210. of an apple loft or storehouse. Cro. Eliz. 854. Cro. Car. 614. 1 Lev. 58. By the owner of the soil, for land which is part of the king's highway, or of an acre of land, described only by the name of land, though there was a wall and porch, and part of a house built upon it. *Goodtitle v. Alker*, 1 Burr. 133. But it does not lie without shewing the quantity and quality of the land, and how many acres of land, meadow, and pasture, &c. 11 Co. 55. 1 Salk, 254. 4 Mod. 97. and *de rivulo*, or *aquæ cursu*; for it must be so many acres of

For what it lies,

For what it does not lie.

land. *Aqua coopert. Yelv.* 143. For a messuage and tenement. 1 *Term Rep.* 11. It lies for a prebendal stall after collation to it, 1 *Wils.* 14. and for a mine, *Cro. Jac.* 150.

How to proceed if Tenant be in Possession.

Where there is a tenant in possession, no lease, &c. is made, and how to proceed,

Where there is a tenant in possession, no *actual lease* is made, *entry* or *ouster* by the defendant, but all are merely *ideal*, for the sole purpose of trying the title; therefore, in order to proceed against him, prepare a declaration, engross it on a treble penny stamp paper, the copy of which, "*upon stamp*," you serve the tenant with; if there be more than one tenant, each must be served with a copy, but if the man is not at home, his wife will do (provided she be served on the premises, or at the dwelling-house or residence of the husband, and so sworn to); this is necessary both in town and country causes. At the time of service, in all cases it is requisite to *read over or explain the notice at the foot of the declaration to the person served, affidavit of which is required.*

If the tenant's *son, daughter, or servant*, be served (the tenant being out of the way), it will not do, unless it appear on the affidavit, that such *declaration came to the tenant's hands in time.* And it should also appear, that he was *acquainted with the meaning thereof*; also that all endeavours have been made to see him, but without effect.

In case servant be served.

In case the servant, &c. be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands *before the time of shewing cause*, or the court will make the rule absolute. *Doe v. Roe, Trin.* 30 *Geo.* 3. In this case, to ground such a motion, you must shew endeavours to serve him at several times, &c. Declaration tendered to servants who refused to call their master, or receive it, saying they had no orders to take any papers; motion that leaving it at the house might be sufficient, which was ordered. *Douglas v. —, 1 Str.* 575. *Cas. temp. Hard.* 164.

Where both kept out of the way.

Tenant and wife both kept out of the way to avoid service, served on servant in the house of the tenant; court granted a rule why it should not be deemed good service. 2 *Burr.* 1181. *Methold v. Noright.*

Motion

Motion on behalf of lessor, why the service of the ejectment made on a woman who said her name was *Margaret Campbell*, at the time when it was served upon her at *Margaret Campbell's* house, should not be deemed good service upon the said *M. C.* herself; and why the lessors should not have leave to sign their judgment against the casual ejector on *Wednesday* next in default of her appearance; and that the leaving a copy of the rule at the house of said *M. C.* with some person there; or if no one could be met with, affixing a true copy of it on the door thereof; should be deemed good service thereof on the said *M. C.* on an affidavit that *M. C.* was not at home, or (if at home) was denied; and that her servant maid was at home, but could not be served, whereupon a copy of the rule was fixed on the door of the house; and that at a subsequent day, the maid being at home, and opening the window, but refusing to open the door, and denying that her mistress was at home, another copy was affixed on the door, and the maid was told the effect of it; and another copy was thrown in at the window, and the original rule was shewn to the maid. *Rule abs. Fenn v. Denn, 2 Burr. 1181. Vide 1 H. Black. Rep. 644. 2 Wils. 263. 1 Black. Rep. 290. 317. My Instr. Cler. C. P. title Ejectment, 4 Ed.*

Tenant in possession being personated at the time of service by another, who accepted the service in her name, this deemed good service on the tenant herself.

When to be served, and of the Notice.

It is to be served before the *essoign-day* of every term, either in town or country, and the notice must be made to appear in the *next term* after delivery; but the delivery on a *Sunday*, or on the *essoign-day* of that term wherein the defendant is to appear, will not do.

When to be served.

If a country ejectment is served on the tenant to appear in *Michaelmas* or *Easter* term, the plaintiff must make his motion for judgment in *that term* he has made the notice of his appearance, or he can have no rule for judgment, unless on special application to the court. *Salk. 257.* May now have a judge's order.

If a country ejectment, and notice to appear in Michaelmas or Easter term.

If the premises be in *London* or *Middlesex*, the notice must be made to appear the *first day* of the *next term* after service; for if made generally, the tenant in possession has the *whole term* to appear in; but if the tenements lie in any other county, the notice must be to appear *as of the next term generally.*

When to make the notice to appear in London. Country.

Declaration.

Declaration by
bill.

Michaelmas term, in the 37th year of the reign of king *George* the third. *Mansfield and Way.*

Middlesex, to wit. *John Doe* complains of *Richard Roe*, being in the custody of the marshal of the *Marshalsea* of our lord the now king, before the king himself: *For that whereas, John Charles*, on the 2d day of *April*, in the 36th year of the reign of our lord the now king, at *Westminster* in the said county, had demised, granted, and to farm let to the said *John Doe*, two messuages, two barns, two stables, two orchards, fifty acres of arable land, fifty acres of meadow, fifty acres of pasture, twenty acres of wood, and twenty acres of furze and heath, with the appurtenances, situate, lying, and being in the parish of *Saint Clement Danes* in the county aforesaid, to have and to hold the said tenements, with the appurtenances, to the said *John Doe* and his assigns, from the 1st day of *April* in the year aforesaid, for and during, and unto the full end and term of five years, from thence next ensuing, and fully to be complete and ended; by virtue of which said demise the said *John Doe* entered into the said premises with the appurtenances, and was possessed thereof, until the said *Richard*, afterwards, to wit, on the said 2d day of *April*, in the 36th year aforesaid, with force and arms, &c. entered into the premises aforesaid, with the appurtenances, which the said *John Charles* demised to the said *John*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John* out of his said farm, and other injuries to him then and there did, against the peace of our said lord the now king, to the damage of the said *John Doe* of 10l. and therefore he brings suit, &c.

A. B. attorney for plaintiff.

Pledges to prosecute

John Doe
and
R. Roe.

Mr. *Richard Roe*,

Notice.

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear ^a the first day of next *Hilary term*, in his majesty's

^a If in the country, say "next

jeſty's court of *King's Bench at Weſtminſter*, (if it be by bill; if by original, "*whereſoever he ſhall then be in England,*") by ſome attorney of that court; and then and there by rule of the ſame court, to cauſe yourſelf to be made defendant in my ſtead, otherwiſe I ſhall ſuffer judgment to be entered againſt me, and you will be turned out of poſſeſſion.

" Hilary term,"
and leave out the
" firſt day."

Your loving friend,

Richard Roe.

The not ſubſcribing the name of the caſual ejector at the foot of the notice, is no ground of application to ſet aſide the proceedings for irregularity. *Hazlewood v. Thatcher*, 3 *Term Rep.* 351. In *C. P.* it is *Barnes* 172. and ſo determined very lately

Michaelmas term, in the 37th year of the reign of king *George* the third.

Mansfield and Way.

London, (ſs.) Richard Roe, late of *London*, yeoman, was attached to answer *John Doe* in a plea, wherefore with force and arms, &c. he entered into five meſſuages, and one acre of land, with the appurtenances, in the pariſh of *Saint Dunſtan* in the *Weſt*, in the ſaid city, which *John Sibthorpe* demised to the ſaid *John Doe*, for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *John Doe*, and againſt the peace of our ſovereign lord the now king; and whereupon the ſaid *John Doe* by *G. G.* his attorney, complains: *For that whereas* the ſaid *John Sibthorpe*, on the 2d day of *April*, in the 36th year of the reign of his ſaid majeſty, at the pariſh aforeſaid, had demised to the ſaid *John Doe* the ſaid tenements, with the appurtenances, *to have and to hold* the ſaid tenements, with the appurtenances, to the ſaid *John Doe*, and his aſſigns, from the 1ſt day of *pril* then laſt paſt, to the full end and term of five years, from thence next enſuing, and fully to be complete and ended, *by virtue* of which ſaid demise the ſaid *John Doe* entered into the ſaid tenements with the appurtenances, and was poſſeſſed thereof; and the ſaid *John Doe* being ſo poſſeſſed thereof, the ſaid *Richard Roe* afterwards, to wit, on the ſaid 2d day of *April*, in the 36th year aforeſaid, with force and arms (that is to ſay), with ſwords, ſtaves, and knives, entered into the ſaid tenements, with the appurtenances, which the ſaid *John Sibthorpe* demised to the ſaid *John Doe*,

The like by
original.

Doe, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John Doe* out of his said farm, and other wrongs, &c. to the grievous damage, &c. and against the peace, &c. whereupon the said *John Doe* saith that he is injured, and hath damage to the value of 10l. and thereupon he brings suit, &c.

Notice.

Mr. T. G. I am informed that, &c. as in the other notice by bill, "*the first day of next Hilary term in his majesty's court of King's Bench, wheresoever he shall then be in England.*"

The best way is to proceed by original.

The best way is to proceed by original; as you prevent the defendant bringing a writ of error (unless in parliament), and the declaration on a single demise is printed and sold at the stationers in blanks already stamped; and in case there should be wanted one on a double demise, it will be as follows:

Declaration by original on a double demise.

Staffordshire, (ss.) Richard Roe, late of *Stafford* in the county aforesaid, yeoman, was attached to answer *John Doe* in a plea, wherefore with force and arms he entered into one messuage, one orchard, one garden, 70 acres of land, 70 acres of pasture, and 70 acres of meadow, with the appurtenances, in the parish of *F.* in the said county, which *J. G.* demised to the said *John Doe*, for a term of years which is not expired; and also wherefore with force and arms he entered into one other messuage, one other orchard, one other garden, &c. (as before), with the appurtenances, in the parish of *F.* in the said county, which *T. P.* demised to the said *John Doe* for a term which is not yet expired, and ejected him from his said several farms, and other wrongs to him then and there did, to the great damage of the said *John Doe*, and against the peace of our lord the now king; and whereupon the said *John Doe*, by *J. K.* his attorney, complains: *That whereas* the said *J. G.* on the 14th day of *February*, in the year of our Lord 1796, at the parish of *F.* aforesaid, in the county aforesaid, demised to the said *John Doe* the said tenements first above-mentioned, with the appurtenances, *to have and to hold* the same to the said *John Doe*, from the 13th day of *February* then last past, to the full end and term of seven years from thence next ensuing, and fully to be complete and ended. *And also whereas* the said *T. P.* on the 14th day of *February*, in the year of our Lord 1796,

Second count.

1796, at the parish of *F* aforesaid, in the said county, demised to the said *John Doe* the tenements aforesaid, secondly above mentioned, with the appurtenances, *to have and to hold* the same to the said *John Doe*, from the 13th day of *February* then last past, to the full end and term of 7 years from thence next ensuing, and fully to be complete and ended: by virtue of which said several demises the said *John Doe* entered into the said several tenements, with the appurtenances, and was possessed thereof, and being so possessed thereof, he the said *Richard Roe* afterwards, to wit, on the said 14th day of *February*, in the year aforesaid, with force and arms, &c. entered into the said several tenements, with the appurtenances, and ejected the said *John Doe* out of his said several farms, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said *John Doe* says he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings suit, &c. Add the notice at the end as before, *to appear generally as of the term*, leaving the words "*the first day of*" out.

How to describe the Premises if a Rectory, &c.

If it be of a rectory, say, he entered into the rec- Rectory.
tory of the parish church of *O.* in the county of *C.*; and also into two messuages, ten barns, ten out-houses, ten gardens, ten orchards, fifty acres of arable land, fifty acres of meadow land, fifty acres of pasture land, and fifty acres of other land, with the appurtenances, situate and being in the said parish of *O.* in the county of *C.* aforesaid; and also into all and singular the tithes of corn, grain, hay, wood, grafs, wool, lambs, and calves, arising, growing, renewing, increasng, and happening, within the said parish of *O.* and within the bounds, limits, and titheable places of the said rectory.

If of a vicarage; he entered into three messuages, Vicarage.
three barns, three stables, three orchards, three gardens, 200 acres of land, 200 acres of pasture land, 200 acres of meadow land, and 200 acres of arable land, with the appurtenances, situate and being in the parish of *I.* in the said county; and also into all the tithes of corn, grain, hay, grafs, wool, lambs, potatoes, parsnips, turnips, and carrots, growing, renewing, and happening within the limits and titheable places

places of the vicarage or parish church of *I.* in the said county.

For a rectory or vicarage, must shew demise by deed.

In an ejectment for a *rectory* or *vicarage*, you must shew a demise to be made by deed, though no lease is actually made, as thus: *For that whereas* the said *John Beech*, on the 2d day of *February*, in the year of our Lord 1796, at the parish of *C.* in the county aforesaid, by his indenture sealed with his seal, and to the court of our lord the king now here shewn, bearing date the day and year aforesaid, had demised, &c.

Manor,

If it be of a manor, the description of the premises is thus: "Entered into the manor of *F.* in the said county, with the rights, members, and appurtenances thereunto belonging, and into fifty messuages, fifty cottages, fifty barns, fifty stables, two mills, fifty gardens, fifty orchards, 3000 acres of pasture land, 3000 acres of meadow, 1000 acres of wood, 500 acres of marsh land, 500 acres of furze and heath, and common of pasture for all manner of cattle, with the appurtenances, in the parish of *F.* in the said county." If tenants in common are lessors, there ought to be a different count on the demise of each: for they cannot make a joint lease. *2 Wils. 232.* But in the case of joint-tenants, each may be said to demise the whole. So of coparceners. *Vide Bull. N. P. 107.*

The thing demanded to be stated with certainty.

In this declaration the law requires, that the *thing demanded* be so *specified*, that the sheriff may certainly know what to give the *possession of*, if plaintiff should recover; for it would be in vain if execution could not be had of the *thing specifically demanded*. *2 Ld. Raym. 1470. 2 Str. 908.* But such a very exact description is not equally necessary in this action as in a *præcipe*: for in this action the plaintiff is to shew the sheriff the premises, and take possession at his peril of only what he has title to; if he takes more, the court will in a summary way set it right. *1 Burr. 629. Coffingham v. King.*

In what County to be brought, and of the Demise.

In what county to be brought.

Day of the demise.

It must be brought in that *county* where the *lands lie*, and the declaration must set forth the *particular parish*; and the *day* of the *demise* must be laid *after* the *title accrues*, otherwise plaintiff will be nonsuited, and the plaintiff must lay the *commencement* of his supposed lease,

lease, to have been *precedent* to the *ejectment* by the defendant. 1 *Sid.* 8. 2 *New Abr.* 171.

If the title of the lessor of plaintiff *accrue* in *Easter vacation*, yet the plaintiff may deliver his *ejectment* as of *Easter term*, and shall recover thereon, because he makes up his issue, or takes judgment as of the *next term*, otherwise the act of the law which supposes the bill filed as of the first day of *Easter term*, before a title accrued to plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a lease made in term time, could not complain till term was over 2 *Vent.* 174. It must be brought within 20 years. 21 *Jac.* 1. c. 16. *Sid.* 432. A tenant at will is not a trespassor, and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle v. Herbert*, 4 *Term Rep.* 680.

If title accrue in Easter vacation, yet you may deliver declaration as of Easter term.

Twenty years.

If there be several lessors, and it is stated that they demised, you must shew such a title in them, that they could demise the whole. *Cro. Jac.* 166.

Motion for Judgment.

This motion should be made the *same term* the notice to appear is, and an affidavit is to be made of the service on the tenant or his wife, and indorsed, *to move for judgment against the casual ejector*; fee to counsel for this motion is 10s. 6d. He may either move it in court, or sign his name to it: If the former, it is handed to the clerk of the rules; if the latter, you take it to his office.

Annex a warrant or memorandum on a 2s. 6d. stamp.

In a town cause you may move this the *first day* of the term; but to have a plea, it must be moved before the four last days of the term; if not, the tenant will have until *two days before the essoign-day to appear and plead*.

Town cause.

If it be a country cause, and the declaration be to appear of *Michaelmas* or *Easter term*, the motion must be made in the term the notice is to appear in, and the rule for judgment must be drawn up of *that term*, according to the new rule; pay rule 5s. 6d. for every tenant after the first. The agent before he makes his motion, keeps a copy of the declaration by him, in order to make up the issue, if it be required.

Country cause.

It

The clerk of the rules to keep a book of the rules delivered out in ejectment.

It is ordered, That the clerk of the rules of this court, shall for the future keep a book, in which shall be entered *all the rules* which from time to time shall be delivered out in ejectment, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned *the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, (the first lessor of the plaintiff, with the words "and others," if there be more than one,) and also the name of the casual ejector.*

Rule for judgment to be taken away two days alter end of the term the ejectment is moved.

And it is further ordered, That unless the rule for judgment be drawn up and taken away from the office of the clerk of the rules, *within two days after the end of the term in which the ejectment shall be moved,* no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment. *R. M. 31 Geo. 3.* It is now usual to bespeak the rule on delivery over of the ejectment.

John Doe on the demise of *J. P.* plaintiff,
In the King's Bench.

Richard Doe defendant.

Affidavit of the service.

A. B. of in the county of maketh oath and saith, that he this deponent did, on the day of last, personally serve *J. B.* tenant in possession of the premises in the declaration hereto annexed mentioned, with a true copy of the declaration and notice thereunder written, hereto annexed, and at the same time this deponent (*read to him the notice thereunder written*), or it may be, acquainted the said *J. B.* of the intent and meaning of the said declaration, and notice thereunder written.

If the wife served.

To be sworn before a judge, if a town cause, and a commissioner, if in the country; engrossed on a treble 6d. If the wife was served, then say, "*served the wife of J. B. the tenant in possession of the premises at the dwelling-house of the said J. B., situate at, &c. or at the place of residence of the said J. B., situate at,*" &c. (it being necessary as well in a town cause, as a country one). The affidavit must be positive that the tenant is *tenant in possession*; for information, or belief, will not do in this case. *Barnard. 330. 429.*

Of Defect in the Affidavit of Service.

It often happens that an affidavit of the service of an ejectment is defective, such as not stating the particular mode

mode in which the party served it, in that case the customary mode has been, when such *defects can be ascertained*, to get a *supplemental affidavit made*, which take to the clerk of the rules, who will attend a judge thereon, and obtain an order to draw up the rule.

Of Judgment for Non-appearance and Plea.

The rule for judgment against the casual ejector being drawn up, if the tenant does not file common bail, *if by bill*, or *if by original*, enter his appearance, and plead within the time limited by the rule, (which in a town cause is 4 days exclusive after motion made, in a country cause 4 days exclusive of the last day of the issuable term,) for which plea search at each of the judges' chambers, who keep an ejectment book for that purpose, then enter on a double half-crown stamp paper, the *memorandum* (if by bill), if by original, "*the declaration only*," so far as the premises; get a roll, enter the *warrants of attorney thereon*, as on other judgments, only say, "*in a plea of trespass and ejectment*," and on producing the rule for judgment, the clerk of the judgments will sign it, and in such case, *common bail* must be filed for the casual ejector, pursuant to *R. M. 33 Car. 2.* if by bill; if by original, there need no appearance, for the rule says *common bail only*; then sue out a writ of possession, pay signing judgment 4s. 2d. if on one demise. The judgment cannot be signed until the afternoon of the 5th day. *Say. Rep. 303.* Sunday, if the *last day*, is not reckoned, *Ibid.*; therefore judgment cannot be signed till the afternoon of *Tuesday*.

How to sign judgment against casual ejector.

Although judgment be signed, if no possession is given or trial lost, and there be merits sworn to, it may be set aside on payment of costs. *1 Salk. 117. Str. 975. Dobbs v. Passer.* The court said great inconveniencies may arise if we do not interfere, timber may be felled, &c. and the *C. P.* make no difference.

If merits, may be set aside.

Of amending Declaration.

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the *demise* mere *matter of form*, nor does it exist;

Amending declaration.

Cow. 841.
Doug. 703.
3 Term Rep. 749.

and on application, the *demise* was ordered to be amended; but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment; 4 Burr. 2447. *Doe v. Pilkington*; therefore as the demise may be altered, there can be no doubt but that other parts less material may also be amended, the action being invented under the control of the court, for the advancement of justice and merely to try the right in question, 1 Burr. 665. The term was amended without consent from 5 to 10 years. *Str.* 1272. *Oates v. Shepherd*. Vide 1211. 5 *Mod.* 333.

Verdict.

A verdict cures a defect in setting out the title, though it cannot cure a defective title. *Stevens v. Evans*, 2 Burr. 1159. Vide 1152. 4 Burr. 2447.

The judges now amend declarations in ejectment, in the demise, after appearance, on a summons for that purpose.

An ejectment is the mere creature of the court, and open to every equitable regulation for expediting the true justice of the case. 2 Black. Rep. 940.

When to enter Appearance in Town.

Appearance in town,

If the tenements lie in *London* or *Middlesex*, and the notice in the declaration be to appear the first day of the term, the tenant has four days exclusive of one day, and including the other, to enter his appearance next after the motion; provided the motion be made before the last four days of the end of the term; if moved after, then until two days before the assign-day of the subsequent term. If the notice should so happen as to be made to appear generally of the term, then the tenant has the whole term to appear in.

If in the Country.

In the country.

If the tenements lie in any other county, the tenant has four days after the issuable term, viz. *Hilary* or *Trinity* (although it is moved in *Easter* or *Michaelmas*); or if it be in a county, as *Cumberland*, where the assizes are held but once a year, then four days next after the end of the term preceding the assizes. It is said that the tenant cannot appear after the time allowed by the common rule for appearing is expired, *Say. Rep.* 151.; but I have no doubt he may, any time before judgment signed.

If term ends on *Wednesday*, tenant has all *Monday* to appear in, and judgment cannot be signed until *Tuesday* afternoon. *Say. Rep.* 303.

It cannot be signed until the afternoon of the fifth day. *Ibid.*

How to appear for the Tenant.

Get a blank consent rule from the stationers, pay 2d. fill it up in this manner (if you mean to defend for all the premises mentioned in the declaration), and the defendant's attorney only signs it, leaving a blank space above for the plaintiff's attorney to do the like, (for this is an agreement entered into by the parties, for the rule itself,) which is afterwards drawn up by the clerk of the rules.

How to appear for tenant.

Michaelmas term, in the 37th year of the reign of king *George* the third.

Mansfield and *Way*.

Middlesex, to wit. *Doe*, ex demise of *Staples*, against *Roe*, for 4 messuages, 4 barns, 4 stables, 500 acres of arable land, 500 acres of pasture, and 20 acres of furze and heath, in *E.* in the county of *Middlesex*.

It is ordered, by the consent of the attornies for both parties, that *Joseph Nix*, who claims title to the tenements in ques-

Common consent rule.

tion, be made defendant in the stead of the now defendant *Richard Roe*, and do forthwith appear at the suit of the plaintiff, and file "*common bail*," (if the declaration be *by original*, leave out the words, "*and file common bail*,") and receive a declaration in an action of trespass and ejectment for the premises in question, and forthwith plead thereto, not guilty; and upon the trial of the issue, confess lease, entry, and ouster, and insist upon the title only; otherwise let judgment be entered for the plaintiff, against the now defendant *Richard Roe*, by default; and if upon the trial of the issue, the said *Joseph Nix* shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute "*his bill*" (if *by original*, say "*his writ*") against the said *Joseph Nix*, then no costs shall be allowed for not prosecuting the same; but the said *Joseph Nix* shall pay costs to the plaintiff in that case, to be taxed: And it is further ordered, that if upon the trial of the said issue, a verdict shall be given for the said *Joseph Nix*, or it shall happen that the plaintiff shall not further prosecute his said "*bill*," (if *by original*, say "*writ*,") for any other cause than for not confessing lease, entry, and ouster, then the lessor of the

the

the plaintiff shall pay to the said *Joseph Nix* costs in that behalf to be adjudged.

R. G. attorney for defendant.

N. B. This rule will do for a country cause.

Explanation of
the consent rule.

This rule confesses the lease supposed to be made to the plaintiff as stated in the declaration, his entry in consequence, and the defendant's ouster of him; therefore the trial now stands upon the merits of the title only; and the original declaration is now altered by inserting *Joseph Nix*, the real defendant, instead of *Richard Roe*, the casual ejector.

If a man is seized in fee of the premises in question, and they are in his own occupation, he enters into the common consent rule only, and not as landlord.

Tenants must
give notice to
their landlords.

By 11 Geo. 2. c. 19. s. 12. "Tenants are obliged to give notice to their landlords of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rack-rent of the premises held by the tenant."

Tenant to a
mortgagor.

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of 11 Geo. 2. c. 19. s. 12. for secreting ejectments, *Buckley v. Buckley*, 1 Term Rep. 647.

It extends to cases only where ejectments were brought, which were inconsistent with the landlord's title. *Ibid.* It appeared that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

When rule filled
up, annex it to
plea, if it be by
bill, file common
bail.

When the rule is filled up and signed, annex to it the plea of the general issue of not guilty; and if the declaration be by bill, file common bail, and deliver a memorandum or warrant at same time on a 2s. 6d. stamp.

The clerk of
bails marks the
rule by consent
before plea filed.

The clerk of the common bails (if by bill) marks the rule by consent, then take rule and plea to one of the judges' chambers, leave same, pay 2s. filing common bail in term, 1s. 2d. in vacation 4d. more.

If it be by original.

If the declaration be by original, then take the rule and plea with the memorandum to the filacer, with a note of appearance, thus, on plain paper: "*Middlesex, (ss) Appearance for Joseph Nix, at the suit of John Doe on the demise of Edward Staples;*" he will sign the rule, and write on it, "*Appearance entered,*"

pay

pay 2s. 6d. take same to one of the judges' chambers, leave it, and pay 2s.

Michaelmas term, in the 37th year of the reign of king *George the third*. *Mansfield and Way.*

Nix ats Doe. } And the said *Joseph Nix*, by *J. J.* Plea of not
ex dem. of Staples. } His attorney, comes and defends the guilty.
force and injury, when, &c. and says, that he is not guilty of the trespass and ejectment above laid to his charge, in manner and form as the said *John Doe* hath above thereof complained against him; and of this he puts himself upon the country, &c.

How to appear for Part.

If there be several persons who claim title, the rule may be drawn *generally* or *particularly*; *generally*, as that *J. S.* who claims title to the premises in question should be admitted for such messuages; and this puts a necessity on the plaintiff, to distinguish by proof, what tenements are in each tenant's possession, otherwise he can have no verdict. But if the rule be drawn *specialy*, that supercedes the necessity of proof that the lands are in his possession. *Buller 95.*

By rule *T. 15 Car. 2.* *It is ordered*, that in every action of trespass and ejectment, where the defendant, by the rule of the court, shall confess lease, entry, and ouster, for so much of the premises in the declaration mentioned, as are in the possession of the said defendant, or his under-tenants, the attorney for such defendant shall immediately deliver to the plaintiff's attorney, a certain note in writing of the tenements so being in the possession of the said defendant, or his under-tenants.

In ejectment defendant's attorney to give plaintiff's attorney notice of the tenements he defends for.

This mode is not now adopted, but instead thereof the *premises defended for*, is inserted in the margin of the rule, and at the end thereof say, *part of the premises mentioned in the declaration*; which makes the rule drawn up special. But still the old mode may be adhered to, by giving a particular notice what you defend for to plaintiff's attorney. But the other way saves the proof of such notice at the trial.

The present mode.

When the appearance is for part, the plaintiff having obtained the rule for judgment against the casual ejector, may sign his judgment for the residue against the casual ejector.

Of Appearance by the Landlord.

Landlord empowered to make himself defendant, &c.

As the tenant in possession of the premises cannot be compelled to appear and enter into the common rule to become defendant instead of the casual ejector, so neither could the landlord alone, and without joining the tenant, enter into such rule, and be made sole defendant, whereby great inconveniencies happened through the obstinacy of tenants; it is therefore provided by *stat. 11 Geo. 2. c. 19.* that if the tenant shall refuse to appear judgment shall be signed against the casual ejector for want thereof; but if the landlord of any part of the land, &c. shall desire to appear by himself, and consent to enter into the like rule that the tenant, in case he had appeared, ought to have done, then the court shall permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall further order therein.

Construction of the act.

By this statute it is provided, that the landlord may make himself a defendant, though the tenant refuses to appear; and though judgment is signed against the casual ejector, the court will order a stay of execution, until they make a further order.

A landlord made defendant without his tenants, may bring error.

The landlord appeared without the tenant, and after a verdict for the plaintiff, he brought a writ of error, upon which the plaintiff moved to take out execution; which the court refused to grant; for though it is left to their discretion, yet that can be only a legal one. The act intended to put the landlord in the place of the tenant, that he should not be stripped of his possession, by any act of the tenant, and it ought to be considered as if the tenant had brought error, which would undoubtedly be a *superfedeas*. This court cannot take upon them to judge, whether there is error in the proceedings or not. *Jones v. Edwards*, *Str.* 1241.

If motion to take out execution against casual ejector after verdict be made, landlord must then shew cause.

If a judgment be against the landlord, and the plaintiff move for leave to take execution against the casual ejector, if the landlord bring error, the day for shewing cause against this rule, is the proper time for so doing, and he may shew the writ of error for cause; otherwise the rule will be absolute, and he cannot open the matter again. *George v. Wisdom*, 2 *Burr.* 757.

W^h

Who are considered as Landlords.

^a In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. *Str.* 914. Notwithstanding *1 Salk.* 250. No man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been *in possession or received rent*, and not a mere stranger. *Lord Holt.* *Comb.* 209.

If ejectment is brought by one claiming as *heir* of a copyhold, and the lord of a manor, who claims by escheat, *pro defectu hæredis*, applies to be admitted to defend with the tenant in possession, or alone; the court will direct the lord to bring ejectment against the heir, and the heir to be admitted to defend with tenant, or alone; if the lord refuses, they will discharge his rule to be admitted; if the heir refuses, they will admit the lord to defend. *Fairclain v. Shamtitle*, 3 *Burr.* 1290.

He who claims title shall be joined as a defendant, though plaintiff opposes it; *1 Salk.* 256.; though she is wife to the lessor; 257.

Rule why *cestui que trust* should not be admitted to defend, was opposed, on a ground that they *had never been in possession*, and could not be considered as landlords. *Lord Kenyon*—If the person requiring to be made a defendant under the act had stood in the situation of *immediate heir* to the person *last seised*, or had been in the *relation of remainder-man* under the same title as the original landlord, I am of opinion, he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be a landlord or not? and therefore we are not authorised to extend the proviso of the statute in such a case as this. *Rule discharged.* *Lovelock v. Doncaster*, 3 *Term Rep.* 783. The reporter has taken it, that the devisees applied, but he corrects it in 4 *Term Rep.* 122., and says the *cestui que trust*.

The court permitted an *heir*, who had never been in possession, to come in and defend the ejectment: *Heir.*

^a If the person who wishes to defend be neither tenant nor actual landlord, but has some interest to sustain, he must move the court on an affidavit of the fact to be made defendant. *Sy.* 363.

the father under whom he claimed died just after having first obtained a similar rule. *Doe dem. Thistlewaite v. Roe*, 4 Term Rep. 122. An affidavit must be made to ground this motion.

Devisee in trust.

J. E. Waight, devisee in trust, was admitted to defend as landlord. Motion was made to discharge that rule. Lord *Kenyon* asked the counsel for the rule, Whether he would consent to try it in an issue, "*de visavit vel non*;" and on his refusal, discharged the rule. *Lovelock v. Doncaster*, 4 Term Rep. 122.

Mortgagee out of possession.

Mr. *Serj. Runnington* says, that when a person applies to be made defendant in the room of the tenant, it is not necessary that he should be the *actual landlord*; it is sufficient if he have an interest only in the lands: it should seem, therefore, that a mortgagee who is out of possession, may be admitted to defend on the tenant's refusal; and he cites *Comb. 332. 3 Burr. 1299*. If the mortgagee was in possession, I should have no doubt, but I doubt as to the other. *Runn. Eject. 181*.

Comb. 399.

Reversioner.

Lord *Bath*, the reversioner, was admitted a co-defendant with the tenant. *Comb. 339*.

How to appear for Landlord.

Give brief to counsel for him to move that the landlord may be made defendant with the tenant; if he appears, and if the tenant does not appear, then that he may appear by himself, and enter into the common rule, and defend his title. When the landlord desires to be made a party to defend the title of the land in question, together with the tenant in possession, the court will grant it, so that he will enter into the rule to confess lease, entry, and ouster.

N. B. This is done by a counsel's hand, for the landlord in possession without any affidavit, fee 10s. 6d. draw up the rule at the clerk of the rules, pay 8s. 6d. make a copy, and annex it to the plea; add also the common consent rule thereto, in which insert the landlord's name as defendant, (and if he appear with the tenant, his also must be inserted); file appearance, or common bail, as the action is, with the memorandum on a 2s. 6d. stamp, and leave plea at the judge's chambers, with the copy of the rules annexed.

At the trial, the landlord must confess, &c.

At the trial the landlord must confess lease, entry, and ouster, and insist only upon the title; and if not, then

then the plaintiff is nonsuited, and judgment afterwards is to be entered against the casual ejector by default. *Sty. Pract. Reg.* 442.

It is necessary to prove the defendant or his tenant in possession of the premises; for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *Smith v. Mann*, 1 *Wils.* 220.

When landlord is made defendant, plaintiff must prove his (the defendant's) tenant in possession.

If a verdict be for the plaintiff against the landlord, he must move the court for liberty to take out execution, on production of the *poslea*—an office copy of the landlord's rule, as also the consent rule; which is a rule to shew cause, and this is the proper time for the landlord to resist the plaintiff taking out execution and obtaining possession; if he brings error, he must then shew that for cause. *Edwards v. Edwards*, 2 *Burr.* 757. If he suffer the rule to be made absolute, the plaintiff may sue out execution (although error be sued out and allowed, if it is not shewn for cause). *George v. Wisdom*, *Ibid.* 756. *Barnes* 182.

If verdict for plaintiff.

If a judgment be signed against casual ejector, the landlord may move to set it aside on the ground of his tenants not having given him notice. And the court will make such a rule on the ground that the possession ought not to be changed where there had been no trial or opportunity of trying, though the obtaining the judgment might be owing to the default, or even treachery of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reasonable that the tenant, who was the person guilty, should pay the costs. *Doe ex dem. Troughton v. Roe*, 4 *Burr.* 1996.

Judgment against casual ejector set aside, landlord having no notice of ejectment from his tenant.

How to proceed after Plea filed.

When the time for appearance is out, search at the judge's chambers for plea and consent rule as before, take them and give receipt in the book, and if you mean to go to trial (first sign the name of the plaintiff's attorney to the consent rule), take same to the clerk of the rules, who will keep and file it, giving the rule itself on stamp, pay him 10s. and 6d. for every name after the first; and when the issue is delivered,

When time for appearance is out, how to proceed.

A copy of consent rule is to be annexed to issue.

livered, a copy of that rule is annexed on plain paper, for which you charge nothing.

Issue by bill,
what term to be
made of.

If the declaration be *by bill*, then make up the issue, with a memorandum of the term the plea is of, inserting the *real defendant's name*, instead of *Richard Roe*, the casual ejector. The memorandum of the issue will be the same as under title *Issue*, only say, "*of a plea of trespass and ejectment.*"

Issue by original.

If it is *by original*, make issue of the same term with the plea, but no memorandum. You begin with the declaration, then add plea and join issue.

Notice of trial.

The same time is allowed for notice of trial in ejectment, as in other cases, both in *town and country*.

Of Infant Lessor.

Infant plaintiff,
must name a
guardian.

If the lessor of the plaintiff is an infant, after the plea is filed, you may have a summons "*to shew cause why further proceedings shall not be staid until a sufficient guardian is appointed for the lessor of the plaintiff, who will undertake to pay the defendant such costs as may be adjudged to him.*" And an order will be granted, although there is a real plaintiff named. You petition in the same manner to appoint a guardian, as under title *Infants*, and the guardian enters into the common rule, and employs an attorney for that purpose.

Of Security for the Costs.

Lessor of the
plaintiff must
give security for
costs.

Proceedings were staid till the lessor of the plaintiff should give security for costs, his residence being in *Ireland*, though this ejectment was brought under the direction of the court of Chancery, and 40*l.* security had been already given there. 2 Burr. 1177, *Doe v. Fulford*.

Where there has been a former ejectment, the rule is, to stay the proceedings in the second ejectment till the costs of the former are paid, and not till security is given for the costs of the second. *Doe ex dem. Selby v. Alston, Bart.* 1 Term Rep. 491. Per Buller J. *Vide* for more, p. 193.

Of making up the Record.

Record.

The record in ejectment is made up in the same manner as others, with two *placitas* of the term the issue is delivered, only say, "*in a plea of trespass and ejectment.*"

"*ejectment*." After trial if the plaintiff obtains a ver- Verdict.
dict, give a rule for judgment, and tax the costs as in
other cases.

On a special verdict it ought to appear, that the Special verdict.
lessor of the plaintiff *might enter* at the time he brought
the ejectment. 1 Burr. 60.

If judgment in ejectment be signed in a country cause If judgment
for want of a plea, but no possession delivered, a judge signed in a
in his chamber, at any time before the assizes, may country cause,
compel the plaintiff to accept a plea, or stay the fur-
ther proceeding; but if possession be delivered, he is
without remedy. 1 Salk. 577. Anon. Per Holt.

If the plaintiff proves his pedigree and stops, and When defendant
the defendant sets up a new case, which the plaintiff shall have reply.
answers by evidence, which ultimately goes to the
jury, the defendant shall have the *general* reply. Good-
title dem. Rivett v. Braham, 4 Term Rep. 497.

Judgments in Ejectment.

And the said *Richard*, by S. U. his attorney, comes Judgment by nil
and defends the force and injury, when, &c. and says outcit, with a re-
nothing in bar or preclusion of the said action of the mittitur dampna.
said *John Doe*, but makes default, by which the said
John Doe remains therein undefended against the said
Richard Roe; therefore it is considered that the said
John recover against the said *Richard*, his said term
yet to come, of and in the tenements aforesaid, with
the appurtenances; and upon this the said *John* freely
here in court remits to the said *Richard* all such da-
mages, costs, and charges, as he the said *John* hath
sustained by occasion of the trespass and ejectment
aforesaid; therefore the said *Richard* is free from those
damages, costs, and charges, &c.; and upon this the
said *John* prays the writ of the lord the king, to be
directed to the sheriff of the county aforesaid, to cause
him to have possession of his said term yet to come, of
and in the tenements aforesaid, with the appurte-
nances; and it is granted to him, returnable on
next after (if by original, on
wheresoever), &c.

At which day, before our said lord the king at *West-* Final judgment
minster, come the parties aforesaid, by their attorney after special ver-
aforesaid; and upon this the premises being seen and dict for the
fully understood by the court here, it is considered, plaintiff.

Hab. fac. posses.

Judgment in
ejectment after
defendant has
withdrawn his
plea and costs
taxed, and also
for the possession.

Judgment signed
— day of
— 1796.

that the said *John* recover against the said *A.* his term aforeaid yet to come, of and in the tenements aforeaid, with the appurtenances, and his damages aforeaid assessed by the said jury in form aforeaid, and also 90l. by the court of our lord the king now here adjudged of increase to the said *John* by his assent, which damages amount in the whole to 90l. 1s. ; and that the said *A.* be taken, &c. And upon this the said *John Doe* prays the writ of our said lord the king, to be directed to the sheriff of the county aforeaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforeaid, with the appurtenances ; and it is granted to him, returnable, &c.

Enter on the roll as far as to the end of the issue, then say, At which day before our lord the king at *Westminster*, came the parties aforeaid by their attorneys aforeaid, and the sheriff did not send the said writ, nor did he do any thing thereupon ; and hereupon the said *C. D.* by his said attorney, comes and relinquishes his averment by him in pleading above pretended, and says, that he cannot deny the said action of the said *John*, nor but that he the said *C.* is guilty of the trespass and ejectment aforeaid, in manner and form as the said *John* hath above thereof complained against him ; and the said *John* further saith and acknowledges, that he hath sustained damages, by reason of the trespass and ejectment aforeaid, besides his costs and charges by him laid out about his suit in this behalf to 1s. and no more : and because the said *C.* doth not deny the same, but admits the allegation to be true, the said *John* prays judgment, and his damages so acknowledged in form aforeaid, together with his costs and charges aforeaid, may be adjudged to him, &c. Therefore it is considered, That the said *John* recover against the said *C.* his term aforeaid, yet to come of and in the tenements aforeaid, with the appurtenances, and the said 1s. damages in form aforeaid acknowledged, and also 7l. 10s. for his costs and charges by him laid out and expended about his suit in this behalf, to the said *John* by his assent, by the court of our said lord the king now here, adjudged ; which said damages, costs, and charges, in the whole, amount to 7l. 11s. ; and that the said *C.* be taken, &c. And the said *John* prays the writ of our said lord the king, to cause him to have

have his possession of the term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and it is granted to him returnable on, &c.

How to proceed if there be a Nonsuit or a Verdict.

If the defendant will not appear at trial, and confess lease, entry, and ouster, the practice is to call the defendant and his attorney, if he be within the rule, and on his non-appearance, or on refusal to comply with the rule, to call the plaintiff and nonsuit him; then, at the plaintiff's instance, the cause of the nonsuit is indorsed on the *postea*, which entitles the plaintiff to judgment against the casual ejector, when the *postea* is returned into court. *Salk. 259.*

If plaintiff is nonsuited for want of confessing lease, entry, and ouster, &c.

If there are several defendants for the same premises, and some appear and confess, but others do not, the practice is to proceed against those who do appear, and enter a verdict for the rest; but then the cause of that verdict is indorsed on the *postea*, which, as to them, entitles the plaintiff to judgment against the casual ejector. *Lord Raym. 729.*

Joint defendants, one appears and confesses, &c. the other makes default.

Where a verdict shall be given for the defendant, or the plaintiff shall be nonsuited for any other cause than for the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *postea*, as in other actions, and sue out a *ca. sa.* against the plaintiff; and if upon shewing the writ under seal to the lessor of the plaintiff, and serving him with a copy of the rule by consent, and demanding the costs, the lessor of the plaintiff does not pay the costs, the court will grant an attachment against him, on affidavit of the facts.

How to proceed after plaintiff is nonsuited on the merits, or a verdict for the defendant.

If the plaintiff is nonsuited for want of *confessing lease, entry, and ouster*, sign judgment against the casual ejector, as if no appearance was entered, upon a double half-crown stamp paper, producing to the clerk the rule for judgment. On the return-day of the *disfringas*, take the record and consent rule, with the judgment paper, to the master, and he will tax the costs on the consent rule; make a copy of the same; serve defendant therewith, and demand the costs; which, if not paid to the lessor of the plaintiff, he may, on affidavit thereof, move for an attachment. There is no occasion to stamp the rule with a double half-crown, nor the *postea*. Shew the original rule.

How to proceed if plaintiff is nonsuited for want of confessing, &c.

After nonsuit, cannot take out writ of possession until the day in bank.

Same point, and held same.

New trial.

Verdict cures a defect in the setting out of the title.

Execution must be taken out according to right.

If verdict for plaintiff, may have *ca. fa.* or *fi. fa.* for costs.

If lessor dies.

Two defendants, and one dies.

Formerly, after a nonsuit at the assizes, for want of confessing of lease, entry, and ouster, the plaintiff's attorney *immediately* signed his judgment and made out a writ of possession: but the practice is since altered, so that now it cannot be done, until after the *postea* comes in *at the day in bank*. *Styles* 442.

The court held that after a nonsuit for want of defendant's confessing lease, entry, and ouster, the writ of possession cannot be taken out, till after the *postea* comes in on the day in bank. *Doe v Copeland*, 2 Term Rep. 780. The *Common Pleas* determined otherwise, but Lord *Kenyon* said, that would not alter the mode of proceeding in this court, and he thought this the best way: and this is the law, for until the *postea* is returned into court, it does not appear that the defendant has not complied with the rule, which is a warrant for the officer to sign judgment against the casual ejector. *Vide Salk.* 259. *Turner v. Barnaby*, *exactly as this is*.

If the plaintiff is nonsuited, he may pay the costs to which of the defendants he pleases. *Str.* 576.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. 4 *Burr.* 2224. *Goodtitle v. Clayton*.

A verdict cures a defect in setting out the title, though it cannot cure a defective title. 2 *Burr.* 1162. The pleadings were intitled, *H. 1 Geo. 3.* the lease said to be made 33d year of *said king*, to hold from the quarter-day then last past; verdict was confirmed, as being a mere mistake of the clerk. *Ibid.*

Execution must be taken out according to what in right and justice is really recovered, and cannot be taken out *for more*; for the judgment is not to be for a moiety only, it must be that he recover his term. 1 *Burr.* 366.

If there be a verdict for the plaintiff, he may have a *ca. fa.* or *fi. fa.* for the costs, and a writ of *hab. fac. pos.* afterwards, or a writ of *possession* and *fi. fa.* together in one writ.

If lessor of plaintiff dies before issue joined, and before the assizes, and plaintiff is nonsuited for want of confessing of lease, &c. executor of lessor shall not have costs. 2 *Wils.* 7.

If an ejectment against two, one dies after issue, but before trial, the death must be suggested on the roll, and

and it must be awarded, that proceedings stay against the deceased, but no need of *quod quer. nil capiat*; and judgment must be, not for a moiety, but that plaintiff recover his term; but he must take execution *for no more than he hath a right to recover.* 1 Burr. 362. *Far v. Denn.*

If lessor of plaintiff dies, this cannot be pleaded *Lessor dies. puis darreir cont.* because the right is supposed in the lessee. *Hob. 5.*

Of the Writ of Possession.

In real actions, where the freehold is recovered, the demandant has execution, by the writ of *habere facias seisinam*; in ejectment, therefore, it is but just, that a similar remedy shall be permitted to the plaintiff, who, as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by virtue of a writ of *habere facias possessionem*, directing the sheriff to give actual possession to the plaintiff of the land recovered. The mode of executing this writ is in my *Office of Sheriff*, p. 177.

It may be sued out though the lessor of the plaintiff be dead, if tested the *last day of the preceding term.* *Doe dem. Beyer v. Roe*, 4 Burr. 1970. The legal relation to the day of the *teste* is proper to be supported in maintenance of a writ of possession on a judgment in ejectment. *Ibid.*

George the third, &c. to the sheriff of *Middlesex*, greeting: Whereas *John Doe*, lately in our court, before us at *Westminster*, by a bill without our writ, and by the judgment of the said court, recovered against *Richard Roe* his term yet to come, of and in one messuage, &c. (*here describe the parcels as in the ejectment exactly*), with the appurtenances, situate, lying, and being in _____ in your county, which *John Charles*, on the 2d day of *April*, in the thirty-sixth year of our reign, demised to the said *John*, for a term of years which is not yet expired, to hold from the 1st day of *April* then last past, unto the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which demise the said *John Doe* entered upon the same tenements, with the appurtenances, and was possessed thereof, until the said *Richard* afterwards to wit, on the same 2d day of *April*, in the thirty-sixth year aforesaid,

A writ of possession by bill.

^a If by original, leave out the words "bill without."

N. B. To be ingrossed on a 3s. 6d. stamped parchment, pay signing with Messrs. Provost and Webb, 1s. 8d. seal 7d.; a præcipe is necessary.

with force and arms entered into the said tenements, with the appurtenances, and then and there ejected, drove out, and removed him the said *John Doe* from his said farm, his said term then and there not being expired, and him the said *John* hath withheld from his possession thereof, and still doth withhold, whereof the said *Richard* is convicted, as appears to us of record: Therefore we command you, that, without delay, you cause the said *John Doe* to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, and in what manner you shall have executed this our writ, make appear to us at *Westminster*, on *Monday* next after the morrow of *All Souls*^a; and have there then this writ. Witness, &c.^b

* If by original, say "on the morrow of All Souls, where-ever we shall then be in England."

Writ of possession, and fr. fa. for costs.

George, &c. (to the end of the *hab. fac. poss.* as far as *return day*), then say, We also command you, that of the goods and chattels of the said *C. D.* in your bailiwick, you cause to be made and levied 26l. which the said *John Doe* lately in our said court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against the said *C. D.* for his said damages which he had sustained, as well by reason of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, adjudged to the said *John Doe* according to the form of the statute in that case made and provided, whereof the said *C. D.* is convicted, as also appears to us of record; and have you the said monies before us at *Westminster* on the said next after to render to the said *John Doe* for his damages, costs, and charges aforesaid; and have there then this writ. Witness, &c. *N. B.* This writ is to be signed and sealed, a *precipe* is made for the office.

The sheriff grants a warrant on this writ; pay 2s. 4d. and he will put the lessor of the plaintiff in possession. One who recovers land part of a highway, must recover it subject to the easement, and the sheriff must deliver possession subject to it. 1 *Burr.* 133.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. A.* lately in our court before us at *West-*

Writ of possession on two several demises by bill.

^b The plaintiff may, in case he does not effectually get possession on the first writ, have an *alias*, but both writs should be, (in case there be a necessity) awarded on the roll and filed; and there must be a suggestion on the roll that the sheriff did not send the first writ, nor did he do any thing thereon; nor can the second writ issue, till the first is returnable. *Palm.* 289.

minster,

minster, by bill without our writ, and by the judgment of the said court, recovered against *R. R.* his term yet to come, of and in five messuages, and one acre of land, with the appurtenances, in the parish of *Saint Luke* in your county, which *J. H.* on the first day of *October* in the thirty-sixth year of our reign, at the parish of *Saint Luke* aforesaid, demised to the said *A.* To hold the same, with the appurtenances, to the said *A.* and his assigns, from the thirtieth day of *September* then last past, to the full end and term of five years then next following: And whereas the said *A.* lately in our same court, before as at *Westminster*, by bill without our writ, and by the judgment of the said court, recovered against the said *R. R.* his term yet to come, of and in five other messuages, and one other acre of land, with the appurtenances, in the said parish of *Saint Luke* in your county, which *J. M.* on the said first day of *October* in the thirty-sixth year of our reign, at the parish of *Saint Luke* aforesaid, demised to the said *A.* To hold the same, with the appurtenances, to the said *A.* and his assigns, from the thirtieth day of *September* then last past, to the full end and term of five years then next following; by virtue of which said several demises, the said *A.* entered into the said several tenements, with the appurtenances, and was possessed thereof; and the said *A.* being so possessed thereof, the said *R.* afterwards, to wit, on the said first day of *October* in the said thirty-sixth year, with force and arms, (*that is to say*) with swords, staves, and knives, at the said parish of *Saint Luke* in your county, entered into the said several tenements, with the appurtenances, so demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, in and upon the possession of the said *A.*, and ejected the said *A.* out of his said several farms; and him the said *A.* hath withheld from his possession thereof, and still doth withhold, whereof the said *R.* is convicted, as appears to us of record: Therefore we command you, that without delay you cause the said *A.* to have his possession of his said several terms yet to come, of and in the several tenements aforesaid, with the appurtenances; and that you certify to us at *Westminster*, on next after in what manner you shall have executed this our writ; and have you there then this writ. Witness, &c. For the Sheriff executing this writ, *vide* my *Office of Sheriff*, p. 176.

Frequently

Retrahit.

Frequently the defendant, after entering into the common rule, wishes to withdraw his plea, and confess the action; in that case you must enter a *retrahit*, or a *relicta verificatione* on the roll, as in p. 598.

Attornment.

The tenant very frequently, to save the expence of sheriff's poundage and officers' fees, attorns tenant to the lessor of the plaintiff; in that case, make such attornment on a piece of paper, thus (naming the cause): some do it on a 7s. deed stamp, which is the safest way.

Attornment.

Be it remembered, that we whose names are hereunder written, being the several tenants in possession of the premises belonging to J. G. situate and being in the parish of, &c. do hereby severally attorn tenants to A. B. of, &c. gentleman (*the lessor of the plaintiff in the above cause*), for such parts of the said premises as are in our respective possessions; and we, each and every of us, have this day severally paid to the said A. B. the sum of 1s. upon such attornment, on account, and in part of the rent due, and to become due from us severally and respectively, for and in respect of the said premises; and we do severally and respectively become tenants thereof to the said A. B. from the day of last past; as witness our hands, this day of 1796.

Proceedings under Stat. 4 Geo. 2. c. 28.

Proceedings under 4 Geo. 2. c. 28. §. 2. where there is a power to re-enter for non-payment of rent, and no sufficient distress to be found on the premises.

“ That in all cases between landlord and tenant, as
 “ often as it shall happen that one half year's rent shall
 “ be in arrear, and the landlord or lessor hath a right by
 “ law to re-enter for non-payment thereof, and no
 “ sufficient distress be found on the premises to satisfy
 “ the same, the landlord shall and may, without any
 “ formal demand or re-entry, serve a declaration in
 “ ejectment for the recovery of the demised premises;
 “ or in case no tenant be in actual possession, then to
 “ affix the same upon the door of any demised messuage;
 “ or in case such ejectment shall not be for the
 “ recovery of any messuage, then upon some notorious
 “ place of the lands, &c. comprised in such declaration;
 “ and such affixing shall be deemed legal
 “ service, which shall stand in the name and place of
 “ a formal

“ a formal re-entry ; and in case of judgment against
 “ the casual ejector, or nonsuit for not confessing
 “ lease, entry, and ouster, it shall be made appear to
 “ the court, where the suit is depending by affidavit,
 “ or to be proved upon the trial, in case the defendant
 “ appears, *that half a year's rent was due before the*
 “ *said declaration was served, and that no sufficient dis-*
 “ *treffs was to be found on the demised premises, counter-*
 “ *vailing the arrears then due ; and that the lessors or*
 “ *lessor in ejectment had power to re-enter, then the*
 “ *lessor shall recover judgment, and have execution ;*
 “ *which if the lessee suffer, without paying arrears*
 “ *and costs, and without filing a bill in equity to be*
 “ *relieved within six months, he shall be barred from*
 “ *all relief, other than by writ of error ; and the lessor*
 “ *shall hold the premises discharged from the lease ;*
 “ *but if the tenant or lessee tender to the lessor or*
 “ *bring into court the rent in arrear, together with*
 “ *costs, all further proceedings shall cease : and if the*
 “ *lessee be relieved in equity, he shall enjoy the de-*
 “ *mised premises, according to his lease, without ob-*
 “ *taining a new one. N. B. This is not to bar the*
 “ *right of a mortgagee, who may pay the rent in ar-*
 “ *rear within six months, and costs.*”

What the affi-
davit ought to
contain.

Bill in equity
not filed within
six months, no
relief.

“ If the lessee file a bill in equity for relief, he must
 “ bring into court in forty days after the lessor's an-
 “ swer, so much as he could swear to be due, over
 “ and above the costs, there to remain till hearing.”

If lessee file a
bill, he must
bring into court
all rent, &c.

Ibid. sect. 3.

Provided, if the tenant shall, before trial, pay or
 tender to the lessor, &c. or pay into court all the rent,
 with costs, further proceedings shall cease. *Sect. 4.*

If tenant before
trial pay, all fur-
ther proceedings
to cease.

The true construction upon this act is, to take off
 the landlord the inconvenience of his continuing al-
 ways liable to an uncertainty of possession (*from its*
remaining in the power of the tenant to offer him a com-
penstation at any time, in order to found an application
for relief in equity), and to limit and to confine the
 tenant to six calendar months after execution granted,
 for his doing this ; or else that the landlord shall from
 thenceforth hold the demised premises discharged from
 the lease. 1 Burr. 619. *Doe v. Lewis.*

Construction of
the act.

If the tenant is served with a declaration in eject-
 ment upon this act of parliament, he may apply by
 summons to stay proceedings upon payment of the
 rent

Tenant may ap-
ply to pay rent,
&c.

rent and costs to be taxed; and if he tender the rent *before ejectment delivered*, court will stay proceedings with costs.

Ejectment how
to be prepared.

The ejectment is prepared as before (it is not necessary to make an actual entry or seal a lease), laying your demise after the rent became due, which is generally *twenty days* after the quarter ended; after service thereof, the following affidavit is necessary, naming the cause:

Affidavit to
move for judgment.

J. K. the lessor of the plaintiff in this cause, and *J. B.* of, &c. gentleman, severally make oath and say; and first this deponent *J. B.* for himself saith, That on the day of last past, and for several days before, the messuage in the annexed declaration of ejectment mentioned, was shut up, and there being no tenant in the possession thereof, he this deponent did, on the day of last, affix a copy of the said declaration in ejectment, hereto annexed, and the notice thereunder written, upon the door of the said messuage, late in the tenure of the said *A. B.* being the most notorious part of the said premises. And this deponent *J. K.* for himself saith, That before such declaration in ejectment was affixed as aforesaid, there was due to him as landlord of the said premises, from the said *A. B.* the tenant thereof, the sum of 14l. for half a year's rent, upon and by virtue of a certain indenture of lease, bearing date the day of 17 , and made between this deponent of the one part, and the said *A. B.* of the other part; and that no sufficient distress was then to be found upon the premises, *countervailing the arrears of rent then due to this deponent*: And this deponent further saith, That he had, at the time of affixing of the said declaration in ejectment upon the door of the said messuage, power to enter on the said premises therein mentioned, by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid. Vide *Cooke's Rep.* 68.

How to move
for judgment.

Move on this affidavit as before, for judgment against the casual ejector, pay counsel's fee 10s. 6d. and if no appearance and plea, draw up rule, and sign judgment.

When landlord
may enter.

Where there is no stipulation in the lease for entry *without demand*, you may, notwithstanding, enter *without demand*, provided *six months rent is in arrear*, and there

there is not a *sufficient distress*; otherwise, in such cases, you must make a demand. *Goodright v. Cator*, Dougl. 486. An actual entry is *not* necessary to maintain this ejectment. *Ibid.* 485. 2 *Ld. Raym.* 750. 1 *Salk.* 259.

An actual entry not necessary.

If the tenant appears and pleads; upon the trial, all the matters in the above affidavit must be proved. 1 *Burr.* 620. ^a *Doe v. Lewis*.

If tenant appears and pleads, what proof requisite.

If brought for Non-payment of Rent only.

By the determination in the case of *Goodright v. Cator*, it appears if an ejectment is brought for non-payment of *rent only*, and not under the above statute, a demand must be made of such rent, previous to the ejectment brought.

In an ejectment for the forfeiture of a lease, the court will compel the plaintiff to give in a particular of the covenants of the breaches of the times when, &c. on which he means to insist that the defendant has forfeited his lease, and extend the rule that he shall not be permitted to give evidence at the trial of any thing not contained in those particulars. *Birch v. Phillips*, 6 *Term Rep.* 597.

For the forfeiture of a lease, a particular of the breaches may be had.

Proceedings by a Mortgagee.

If the mortgagee have a *right of entry*, and the premises be *tenanted*, he may serve an ejectment; but if the premises be *vacant*, then he must seal a lease thereon as before stated.

It appears that a mortgagee may recover in ejectment (without notice to quit) against a tenant who claims on a lease from the mortgagor granted *after the mortgage*, without the privity of the mortgagee. *Keech v. Hall*, Dougl. 21.

When no notice.

But if there is a tenant from *year to year*, and the landlord mortgages, *pending the year*, the tenant is entitled to *six months notice from the mortgagee*. *Birch v. Wright*, 1 *Term Rep.* 378.

When necessary.

It is said, that if the mortgagee has encouraged the tenant to lay out money, he cannot maintain this action. *Ibid.* *Cowp. Rep.* 473.

If he has encouraged tenant.

^a In case of judgment against the casual ejector, (and nonsuit for not confessing, &c.) the stat. directs, that it shall be made appear to the court "by affidavit." On the trial, the same thing must be proved. *Dennison, J.* *Ibid.*

If the mortgagor be left in possession after mortgage.

When the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases. *Dougl. 22. Keech v. Hall. Moss v. Gallimore, 279.*

Lease.

The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. *Dougl. 22.*

Mortgagee may proceed if he has given notice to the tenant that he will not disturb him.

The courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. *Lord Mansfield. Dougl. R. 282. Moss v. Gallimore.*

After notice, he is entitled to rent in arrear.

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. *Moss v. Gallimore, Dougl. 279.*

The stat 7 Geo. 2. c. 20. enacts, "That where an ejectment is brought by a mortgagee to recover the possession of mortgaged premises, if pending the suit, the person who has a right to redeem, shall appear and pay the mortgagee, or bring into court the principal, interest, and costs, to be computed by the proper officer, he shall be discharged from the mortgage; and the court shall, by rule, compel the mortgagee to reconvey the premises, and deliver up all deeds relating to the title of the same."

A judge's order will do.

A judge's order may be had for this purpose: and the master is to make all just deductions and allowances on paying off the mortgage.

I applied under this act after a writ of possession by summons to pay principal, interest, and costs; and the lessor of plaintiff's attorney objected to come into the terms. Mr. Justice Buller said, Do you choose to have a bill to redeem? If so, I cannot relieve. But, by consent, he made the order. *Doe ex dem. Bunce v. Roe, E. T. 1791.*

Court will order all proceedings

If the mortgagee bring an ejectment, the court will order him to shew cause why, on payment, or bringing

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ing into court, principal, interest, and costs, proceedings should not be staid. *Str.* 413. Now done by summons.

On the application of the mortgagor, or his assignee, of the equity of redemption, the court will stay proceedings on payment of principal, interest, and costs, without paying money due on bond: But not if it was an heir. *Str.* 1107. *Archer v. Snatt. Eq. Cas.* 325. *Andrews* 341.

The like without payment of a bond for money lent.

On payment of principal, &c. court will stay proceedings, and on bond for performance of covenants in a deed of mortgage, and will discharge defendant out of custody, though he had agreed to convey the equity of redemption to plaintiff, if no tender was made of conveyance to be executed. 1 *Wils.* 80. *Skinner v. Stacey.*

On payment, will stay proceedings on bond, &c.

How to recover the Mesne Profits, and from what Time.

If judgment be obtained in ejectment, bring an action for the mesne profits; and as it is consequential to the recovery, it may be brought either in the name of the *nominal plaintiff*, or in the name of his lessor; and in either shape, it is equally his action *against the tenant* in possession, to recover the value of the profits, unjustly received by the tenant, in consequence of the ouster complained of in the ejectment; for after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne profits, *from the time of the ouster complained of* in ejectment; but if he proceed for *antecedent profits*, he must prove his title to the premises from whence they arose, to shew his right to receive them. 2 *Burr.* 668. *Aslyn v. Parkyn.*

In order to prove the plaintiff's title, it is only necessary to produce the office copy of the judgment in ejectment, where the judgment is after verdict, together with the attorney's bill; but if by default, then a writ of possession executed is necessary. But a learned author says, that the latter does not seem requisite, for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because his possession is part of his title. As

Proof required in such action.

Jury are not confined to the mere rent.

If brought by nominal plaintiff, court will stay the proceedings till security.

Tenants in common may have this action.

Cannot pay money into court.

In an action for the mesne profits if recovery be for 1s. judge must certify for costs, or none.

How to remove an ejectment from the Mayor's court, London.

to the value of the mesne profits, they must be proved; but in estimating that value, the jury are not confined to the mere rent of the premises, for they may give whatever damages they think proper, though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. 3 *Wils.* 121. 2 *Burr.* 667. *Bull. N. P.* 88.

And in case an action be brought by the nominal plaintiff, the court, on application, will stay the proceedings thereon, till security is given for costs. *Ibid.*

If one tenant in common recovers in ejectment against another, he may have an action for the mesne profits. 3 *Wils.* 118.

The defendant cannot pay money into court in an action for mesne profits. 2 *Wils.* 115.

The plaintiff in an action for mesne profits recovered less than 40s., and the judge did not certify that the title came in question, the master allowed him 1s. costs. Motion to review the taxation. Lord *Kenyon*. — This action is founded *wholly* and entirely on title. The judge might have certified in this case, *that the freehold or title was chiefly in question* under stat. 22 & 23 *Car. 2. c. 9.*; but not having done so, the plaintiff is entitled to no more costs than damages. *Doe v. Davies*, 6 *Term Rep.* 593.

If Ejectment be in inferior Court.

In *ejectment*, a writ of *habeas corpus* is the proper process to remove the plaintiff (under which the defendant must appear in this court, and enter into the common rule, and plaintiff must declare *de novo*), and not a writ of *certiorari*, as in replevin, whereby, after the record removed, the parties are to proceed upon it, and not begin *de novo*.

Consolidating Declarations.

Ten declarations on the same demise were delivered for 10 houses in *Steyning* in *Sussex*, in the occupation of 10 persons. The court was moved to have them all put in one issue, suggesting that the title was the same in all, but refused. *Str.* 1149. The application should be made early, and before issue delivered, to save costs of the several entries and dockets. If

If there is a mortgage on 10 houses to *A.* and there be 10 tenants, and the premises in one county, surely the court will not suffer an attorney to make 10 causes on the same demise at this time, since the case of *Cecil v. Briggs*, 2 Term Rep. 639.

Proceeding in a second Ejectment, Costs of former not paid.

Where there has been a former ejectment brought, the court will order the proceedings to be staid in a second ejectment, until costs of the former is paid, but not security for the costs of the second. 1 Term Rep. 491.

The husband of the present defendant, near twenty years ago, brought an ejectment against the present plaintiff, and recovered possession, but he never recovered the costs in that suit; now this ejectment was brought for the same premises, *E. 35 Geo. 3.* Rule to shew cause, why the proceedings should not be staid till the costs of the former ejectment were paid to the defendant, who was the sole executor of her late husband. It was contended that the rule, if the same plaintiff bring two ejectments for the same estate, the court will compel him to pay the costs of the first, before he proceeds in the second, did not apply to such a case as the present, where the lessor of the plaintiff was the defendant in the former ejectment. But the court said, that it was immaterial for the purpose of this rule respecting the costs, whether the present lessor of the plaintiff were the plaintiff or defendant before; and made the rule absolute. *Thrustout dem. Williams v. Holdfast*, 6 Term Rep. 223. ^a

The courts now consider a former ejectment in another court, as one in the same court, and will stay proceedings in a second. *Str. 548. 2 Black. Rep. 1158.* Vide 1 *Str. 554. 1 Term Rep. 491.*

Proceedings in a second ejectment were staid till the special verdict in the former was determined. 2 *Str. 1105.* Vide 2 *Black. Rep. 1815.* where plaintiff was refused to discontinue, after special verdict, to adduce fresh proof in contradiction to the verdict.

^a Proceedings staid till the costs of a nonsuit obtained in 1793, brought to try the same title, were paid, although there was another defendant not party to the last ejectment, and it was brought for different lands in a different county. 6 Term Rep. 740. 2 *Str. 1152. 318. T. 36 Geo. 3.*

Vide p. 167.

If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the court will stay the proceedings until he pay the costs of the former cause.

Bankrupts.

Bankrupts imprisoned after certificate allowed, how to be discharged.

IF any bankrupt, who shall have obtained his certificate, shall be taken in execution, or detained in prison, on account of any debts due *before* he became bankrupt, by reason that judgment was obtained *before* such certificate was allowed and confirmed, it shall be lawful for any one or more of the judges of the court where in judgment has been so obtained, on such bankrupt's producing his certificate, allowed, to order any sheriff, &c. who hath any such bankrupt in his custody, by virtue of any such execution, to discharge such bankrupt out of custody, without payment of any fee. 5 Geo. 2. c. 30. s. 13.

How to discharge a bankrupt.

If the bankrupt was in custody *before* his certificate is signed, and afterwards it is allowed, apply to a judge, at his chambers, for a summons to shew cause *why* he should not be discharged, he having obtained his certificate; which, upon producing, and an affidavit (if the attorney does not attend for the plaintiff) of the debt having accrued *before* he became a bankrupt, and that the certificate was obtained without fraud, the judge will grant an order upon the *third* summons on affidavit of the service.

Cases relating to Bankrupts.

Execution after certificate signed.

An execution against the goods of a bankrupt, taken out *after* his certificate is signed by the creditors, and *before* it is allowed by the chancellor, is valid. *Callen v. Meyrick*, 1 Term Rep. 365.

Bond given after the bankruptcy for a debt due prior, good.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt was contracted before. And if the obligor were in custody, charged in execution, it is not necessary that an attorney should be present, on his part, at the time of executing the bond and warrant. *Birch v. Sharland*, 1 Term Rep. 715.

Cannot be discharged from an extent.

If the bankrupt be in custody at the suit of the king, on an extent, he cannot be discharged therefrom. 1 Atk. 220.

A bankrupt in custody, on an attachment for the non-performance of an

A bankrupt was taken upon an attachment for not performing an award; after which he became bankrupt, and obtained his certificate; and the court held, that this was a demand for which an action of debt will

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will lie; and the act says, he shall not be arrested, &c. for any debt due before the bankruptcy; and therefore he was discharged. 2 Str. 1152. *Baker's case*.

award, discharged, on having his certificate.

On motion to discharge a bankrupt out of execution, on the Stat. 5 Geo. 2. c. 30. it appeared, that the debt was contracted before the bankruptcy, and sued for and recovered pending the commission, and before any certificate obtained; and the judgment was afterwards affirmed on error, and costs given on such affirmance. The court discharged him as to all; for not having his certificate, he could not plead to the action; and these costs were attendant on the original judgment, and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought. 2 Str. 1196. *Graham v. Benton*.

A bankrupt discharged from a judgment given after his bankruptcy, for a debt due before.

A certificate discharges a bankrupt from a debt accruing before the commission, though judgment be not obtained till after the certificate allowed. *Boutflower v. Coates*, Cowp. Rep. 25.

When the certificate will discharge the debt.

A certificate obtained under a second commission is void, for a second commission cannot be taken out against an uncertificated bankrupt, because all his effects belong to the creditors of the first: therefore, when he had put in bail, and an application for an *exoneratur*, the court refused. *Martin v. O'Hara*, Cowp. Rep. 823.

A certificate under a second commission.

The penalty of a bond for securing an annuity having once been forfeited before a bankruptcy, the value of the annuity may be proved, and the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture, and before the bankruptcy. *Willie v. Wilkes*, Dougl. Rep. 520.

Annuity bond when forfeited.

A certificate will be no bar to an action for the mesne profits, for as the damages are uncertain, they cannot be proved under the commission. *Goodtitle v. North*, Ibid. 584. 6 Term Rep. 489. *Vide*, if the demand is such that the amount can be liquidated, 3 Term Rep. 539. *Utterson v. Vernon*.

Mesne profits.

But if an action be brought upon a bail-bond against the bankrupt himself, though he is discharged from the original debt by his certificate, yet he is not from this; for the court said, that this was a new debt,

Certificate will not discharge the bankrupt upon an action on bail-bond.

debt, and distinct cause of action, and therefore refused to relieve the bankrupt, and ordered the sheriff to pay the money to the plaintiff. *Cockerill v. Owston*, 1 Burr. 436. But court said, the certificate shall discharge proceedings depending against bail, in an action upon the old debt, who are not already fixed, *Ibid.*

When there is an act of bankruptcy between becoming bail in error and affirmation, no discharge.

The defendant, 9th of May 1734, was bail in error: 25th October following he committed an act of bankruptcy, and after got his certificate. On 12th November, judgment affirmed; and to an action on the recognizance he pleaded his certificate: held he was not discharged; for it was a contingent debt, for which the plaintiff could not come in under the commission, the Stat. 7 Geo. 1. c. 51. only letting in those where the payment was certain, though future. 2 Str. 1043. *Hockley v. Merry.*

A surety of a bond.

A surety of a bond who pays the debt after the bankruptcy of his principal, is not barred by the certificate, though the bond was forfeited before the bankruptcy. *Cowp. Rep.* 525. *Taylor v. Mills.*

When a surety may hold to bail.

A surety who does not pay the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding his certificate. Vide 3 Wils. 262. *Goddard v. Vanderheyden.* *Ibid.* 346. *Young v. Hockley.* The rule of law is, that though a party make himself liable for the debt of another by a contract prior to the bankruptcy of such other person, and he does not actually pay that debt, till after the commission of bankruptcy, he cannot prove his debt under the commission. Here it was not paid till afterwards; and as the debt only accrued by actual payment, there was no debt to which he could swear at the time of the bankruptcy. *Paul v. Jones*, 1 Term Rep. 599.

Bankrupt sued as an executor, and pleads a false plea, is liable to costs, certificate before, no discharge.

A bankrupt being sued as an executor, pleaded a false plea, which being found against him, the plaintiff had judgment *de bonis propriis* for the costs; after which he obtained his certificate. *Cur.*—The pleading a false plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to his false plea, which was subsequent to the issuing of the commission; consequently could not have been proved under the commission,

mission, and therefore cannot be discharged by the certificate. *Howard v. Jemmett*, 3 Burr. 1368.

If the cause of action arises before the bankruptcy, interest and costs accrued since, are likewise discharged. *Cowp. Rep.* 138. *Blandford v. Foote*. 2 Str. 1196. 1 Wils. 41.

Interest and costs.

A commission issued against defendant, Dec. 1782, who afterwards obtained his certificate. In August 1787, plaintiff brought an action against him on balance of accounts, obtained interlocutory judgment in *Michaëlmās* following; 19th Jan. 1788, a second commission issued against defendant; on 31st same month, plaintiff signed final judgment, and error was brought; 16th June 1789, defendant obtained his certificate under the second commission, but under this he did not pay 15s. in the pound; 30th May 1790, error was nonprossed, and costs 40l.; in *Trinity* term 1794, plaintiff sued by *sci. fa.* to revive the judgment, defendant pleaded his certificate; verdict for plaintiff, sittings after the term, 269l. 12s. 6d., and 40l. costs in error; the costs of *sci. fa.* were taxed at 36l. On 2d April 1794, the defendant's goods were taken in execution for the 269l. 12s. 6d. and the 40l.; and same day defendant was taken in execution for the 36l., and a friend paid it into the hands of the sheriff, till the opinion of the court could be had. *Rule why the 36l. so paid should not be restored, and why defendant should not be discharged as to any future arrest on account of the same.* In support of the rule, was cited 2 Bl. Rep. 1317. *Aylet v. Harford*; 1 Wils. 41. *Graham v. Benton*; 1 H. Black. Rep. 291. *Lewes v. Piercey*; and *Cowp.* 138. *Blandford v. Foote*: Against it, 1 Black. Rep. 400. *Co. Bank. L.* 152. 1 Atk. 140. Court—We are clearly of opinion, that the certificate delivers the defendant from the costs of the *sci. fa.* as well as from the original judgment. It has been carried farther, that where a writ of error is brought to reverse a judgment, which is frequently a dilatory proceeding, and which in many cases is reprehensible, yet as it springs out of the original debt, which is the *substratum* of the whole, the certificate which discharges the bankrupt from the original debt, also discharges him from the costs of prosecuting the writ of error. In the present case, the *sci. fa.* was sued out by the plaintiff to enable him to reap the fruits of his judgment;

If A. recover a judgment against B. before the bankruptcy of B., and revive it by *sci. fa.* after the bankruptcy, the costs of the *sci. fa.* relate back to the judgment, and may be proved under the commission.

it was a step to lead to execution for his original demand, and the defendant being discharged as to the original judgment, we think that all the means that conduce to that end must be considered as consequential upon, and included in the original demand. *Rule abs. Phillips v. Brown, 6 Term Rep. 282.*

How Bail are to be relieved.

If bail of a bankrupt are proceeded against, they may, *before a scire facias* be returned *scire feci*, or before the return of the second *sci. fa.* (in case the bankrupt has obtained his certificate), apply by summons for an *exoneretur* to be entered on the bail-piece, on the defendant having obtained his certificate, and on producing the certificate, and affidavit of the debt having accrued before the bankruptcy of the defendant, with that of having obtained his certificate without fraud, the judge will on the third summons, on affidavit of the service and attendance, grant an order for that purpose.

Rule.

The rule is, if the certificate be obtained, *before the bail are fixed*, they shall be discharged; but if they be fixed *before the certificate is obtained*, they remain liable *Woolley v. Cobb, 1 Burr. a 244.*

If bankrupt be in custody at the suit of a creditor, who has proved his debt, he may petition for plaintiff to elect.

Notwithstanding a bankrupt cannot be discharged out of custody upon an arrest, *before* his certificate is allowed, yet if the creditor prove his debt under the commission, the defendant may, by petition, apply to the court of Chancery, for him to elect, whether he will proceed at law, or take his debt under the commission; and though he does make his election, yet he may assent to, or dissent from, the certificate. *1 Atkins 220.*

In Chancery. In the matter of *A. B.* a bankrupt.

To the Right Honorable the Lord High Chancellor of Great Britain.

The Humble Petition of the said Bankrupt,

Sheweth,

Petition for plaintiff to elect.

That a commission of bankrupt, on the day of 17, was issued under the Great Seal of

^a But if they be bail in error, although the principal become bankrupt and obtain his certificate, they cannot be discharged, *Southgate v. Branshawite, 1 Term Rep. 624.*

Great

Great Britain, against your petitioner, directed to *U. B.*,
H. H., *H. R.*, *H. C.*, esquires, and *R. H.* gentleman.

That *J. C.* of _____ in the county of _____
weaver, a creditor of your petitioner,
did prove, at one of the meetings under the said com-
mission, a debt due to him from your petitioner, to
the amount of 150*l.*

That the said *J. C.* lately issued out of his majesty's
court of *King's Bench*, against your petitioner, a writ
of *latitat*, returnable on, &c. and caused your peti-
tioner to be arrested for the said sum of 150*l.* so proved
under the said commission.

"Your petitioner, therefore, most humbly prays

"your lordship, to order the said *J. C.* forth-

"with to make his election either solely to pro-

"ceed at law against your petitioner, or take

"his said debt under the said commission:

"And that in case he should elect to take the

"said debt under the said commission, that

"then your lordship will be pleased to order

"the said *J. C.* to release your petitioner from

"the said action, at his own costs and charges;

"or that your lordship would be pleased to

"grant your petitioner such other relief in the

"premises as to your lordship may seem meet.

"*And your petitioner shall ever pray,*" &c.

This petition is to be engrossed on a treble six-penny
stamp paper, and left at the Bankrupts-office, *Bell-*
yard, with a fair copy for the lord chancellor, upon
plain paper. When he has answered it, serve copy
on the plaintiff's attorney and his client, make affi-
davit thereof, and also let the defendant make affi-
davit that the plaintiff has proved the debt under the
commission, and that he does not stand indebted to
him in any other sum. Upon the hearing of the pe-
tition, get solicitor under the commission to attend
with the proceedings, pay him 20*s.*

How to proceed
upon this peti-
tion.

Proceedings against Prisoners.

If any person is in custody of the marshal or keeper
of any other prison, it will behove the practitioner to take
care, and observe the rules laid down in the strictest
manner, in proceeding against him; otherwise his
client may lose the custody of the prisoner, the law
paying the highest regard to the liberty of the subject.

The present mode for delivering declarations against prisoners.

To be alledged in declaration, in whose custody prisoner is.

In declaration it must be alledged at whose suit detained.

Rule E. 35 Geo. 3. for the limits of the King's Bench prison.

Formerly when a defendant was detained in custody by mesne process of this court for want of bail, if the plaintiff did not, within *two terms* after the arrest, cause the defendant to be brought by *habeas corpus* and committed, so that he might declare against him in custody of the marshal, the defendant might be discharged out of custody upon common bail or appearance; but now by stat. 4th and 5th year of *W. and M. c. 21. s. 2.* it is enacted, *That if any defendant be taken or charged in custody, at the suit of any person on any writ out of the courts at Westminster, and imprisoned for want of sureties, the plaintiff in such writ may, before the end of the next term after such writ shall be returnable, declare against such prisoner in the court where such writ shall issue, whereupon the said prisoner shall be taken or charged in custody; and may cause a true copy to be delivered to such prisoner, or to the gaoler or keeper of the prison, in whose custody he shall remain; to which he shall appear and plead; and if not, the plaintiff shall have judgment.*

That on all such declarations on process out of this court, it shall be alledged, "*in custody of what sheriff, bailiff, or steward, or other person, such prisoner shall be at the time of such declaration, by virtue of the said process of the said court, at the suit of the plaintiffs.*" *Sect. 3. N. B.* This means where the proceeding is by *bill*, but if by special original, the old form is adhered to.

When you declare against a prisoner in custody of the sheriff, you must alledge him to be "*at the suit of the plaintiff,*" or the declaration is ill. 1 *Wilf. 119. Ld. Raym. 1362.*

Ordered, that the rules of the *King's Bench* prison shall be comprised within the bounds following, exclusive of the public houses hereinafter mentioned; that is to say, from *Great Cumber-court*, in the parish of *St. George the Martyr*, in the county of *Surrey*, along the north side of *Great Suffolk-street*, as far as the brew-house; and from thence along the north-west side of *Webber-street*, to the *Half way house*; and from thence along the western side of *Barron's Buildings* and *St. George's Row*, to the *Westminster Road*; and then across the said road, and along the western side of *St. George's Mall*; and from the pastry cook's at the west end thereof, directly across to the lamp-post, on the foot-

foot-path near the watch-house facing the *Dog and Duck*; and along the said foot-path, from the said lamp-post, to another lamp-post on the eastern side of the said road facing *Key's Nursery*, and then along the whole of the said road, leading by *Prospect Place*, to the *Elephant and Castle*; and from thence along the eastern side of *Newington Causeway*, to *Great Cumbercourt* aforesaid: *And it is also ordered*, that the house of correction for the county of *Surrey*, the new gaol *Southwark*, and the gaol now building for the county of *Surrey*, and the highways, exclusive of the houses on each side thereof, leading from the *King's Bench* prison, to the said gaols respectively, shall be within and part of the said rules: *And it is lastly ordered*, that all taverns, victualling-houses, ale-houses, wine-vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainments, shall be excluded out and deemed no part of the said rules.

Taverns, &c.

By rule *H. T. 26 Geo. 3.* it is ordered, that from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained, or charged in custody by *mesne process*, hereafter returnable issuing out of this court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison, where such prisoner is or shall be detained, or charged in custody, *before the end of the next term after the return of the process by virtue whereof such prisoner is or shall be taken, detained, or charged in custody*, and (unless the prisoner is or shall be in custody of the marshal) cause an affidavit to be made and filed with the clerk of the rules of this court *of the delivery of such declaration, and the time when, and the person to whom the same was delivered, before the first day of the next term after the delivery of such declaration*, the prisoner shall be discharged out of custody by writ of *superseas*, to be granted by this court, or one of the judges thereof, upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

New rule respecting the declaration against prisoners.

Affidavit.

And in case of a *commitment or surrender* to the marshal in discharge of bail, after the return of process, and before a declaration delivered, unless the plaintiff shall cause declaration to be delivered, as aforesaid, before the end of the term next after such commitment

In case of commitment or surrender.

commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged out of custody by writ of supersedeas, to be granted as aforesaid, upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary.

If a habeas corpus and commitment, how to proceed.

That in all cases where a prisoner shall be taken or charged in custody by any sheriff or other officer by *mesne process* of this court, and shall be afterwards removed by writ of *habeas corpus* and committed thereupon by this court, or any of the judges thereof, to the custody of the marshal, the time for the plaintiff's proceeding against such prisoner shall commence and be computed from the prisoner's being first taken or detained, or charged in custody, by virtue of such process.

No treaty to prevent, unless it be in writing.

That no treaty or agreement shall be sufficient cause to prevent any defendant's having the benefit of a *supersedeas* for want of prosecution, unless the same be in writing, signed by the defendant or his attorney, or some person duly authorized by the defendant, and it be therein expressed, that proceedings are staid at the defendant's request. *Ibid.* For the further part of this rule, vide title, *How to discharge for Want of proceeding to Trial.*

Plaintiff must declare in two terms on an escape warrant.

That where any defendant, being a prisoner in custody of the marshal of this court upon *mesne process*, shall be taken and detained in custody of any sheriff of this kingdom, by virtue of a judge's warrant of this court, for an escape made from the custody of the marshal, "it is ordered, that the plaintiff in such action shall declare against the said defendant in custody of such sheriff, before the end of the second term after such taking, otherwise a *supersedeas* may be made for such defendant." *R. T. 6 Ann.*

If writ be sued out in one term, returnable the next, plaintiff is not bound to declare before the end of the next term after return of writ.

The 11th June 1795, 13 days before the end of Trinity term, process issued, and on same day defendant arrested on a writ returnable first return of Michaelmas term following; no declaration having been delivered in the Michaelmas term. Rule why defendant should not be discharged for not declaring in two terms. Court—The plaintiff is only bound to declare before the end of the next term after the return of the writ. Rule discharged. *Richardson v. Richardson*, 6 Term Rep. 547. Hilary term 1796.

How

How to proceed after Arrest in Custody of the Sheriff.

By rule *E. 5 W. & M. reg. 3.* it is ordered, that no copy of a declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody.

Not to deliver declaration before return of process.

An amendment was made in a declaration against a prisoner being intitled 30th year, instead of 31st year. *Per Buller J.*—I think this must have been by the bill filed.

Amendment.

If Action be not bailable.

If the action be not bailable, and defendant a prisoner, he is to be served with process, and if he do not appear, file common bail according, &c.; and you may declare *de bene esse* by filing a declaration in the office, giving him notice as usual. *1 Term Rep. 191. Robertson v. Douglas.* So such prisoner may be served with process, though he has surrendered himself to take the benefit of an insolvent act.

If action not bailable.

Surrey, } John Denn complains of Richard Fenn
to wit. } being in the custody of the sheriff of the county of *Surrey*, by virtue of his majesty's writ of *latitat*, issued out of the court of our lord the king, before the king himself, against the said *Richard*, at the suit of the said *John*, returnable before the king himself at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, of a plea of trespass on the case: For that whereas (as in other declarations). Add pledges.

Declaration against a prisoner in custody of the sheriff.

Engross one copy on treble penny stamp parchment, and file it with the clerk of the declarations, then make three other copies on treble 1d. paper, one of which deliver to the gaoler or turnkey^a, in whose custody defendant is, asking him "if defendant is a prisoner at the suit of the plaintiff," pay him 1s. if he acknowledges defendant to be in his custody, make an affidavit of the service, and swear it either before a judge or commissioner in the country, annexing one of the copies of the declaration delivered thereto: when it is sworn, make an office copy of the affidavit of the service on treble 6d. and annex it to the other copy of the declaration; take both to the clerk of the rules, who will keep the one, and

Of delivering and filing declaration.

^a 1 Str. 474.

and give a rule to appear and plead on the other copy, bring back the same; pay 3s. 10d.

In the *King's Bench*. *John Denn*, plaintiff,
and

Richard Fenn, defendant.

The affidavit.

A. B. of, &c. gentleman, maketh oath and saith, That he did on the day of last past, deliver unto *C. D.* gaoler or keeper of his majesty's gaol in and for the county of *Surrey*, a true copy of the declaration hereunto annexed; and the said gaoler or keeper then acknowledged to this deponent, that the said defendant was a prisoner in the said gaol, at the suit of the said plaintiff *John Denn*, by virtue of a writ of *latitat* issued out of this honorable court, returnable before the delivery thereof.

The affidavit is to be filed before the first day of the next term after delivery thereof.

Demand of Plea.

If defendant removes himself to the Fleet, pending the suit, no demand is necessary.

The plaintiff proceeded in last *Trinity* term against defendant, then in custody of the sheriff of *Middlesex*, in *Newgate*; in another cause a rule to plead was given in the same term, but plaintiff not then proceeding to judgment, gave another rule to plead in *Michaelmas* term last; and afterwards signed judgment for want of a plea, but no demand was made of the plea. In the intervening *Trinity* vacation, defendant was removed from *Newgate* to the *Fleet* by *hab. corp.* without notice to plaintiff. Rule why proceedings should not be set aside for irregularity, on the ground that demand of plea was necessary. Court said, Proceedings were regular: that as no demand of plea was necessary when a defendant is in custody of the sheriff, he ought not, by surreptitiously procuring his removal from that custody, to require the plaintiff to take any other steps that would have been necessary before his custody was changed: that such removals required information. *Rule disch. Wilkinson v. Brown*, 6 *Term Rep.* 524. ¶ This sort of practice is easily learnt, the advice is from men who attend these prisons, or who are in prison themselves. If after declaration, it will cost the plaintiff near 5l. to charge defendant in execution; which forces many plaintiffs to give up the pursuit. I have known two removals, the one before declaration, the other after,

after, on purpose to put plaintiff to expence. I wish to refer the judges to 1 *Salk.* 350. where it is said, each court shall retain the defendant in which he is first attached.

It is determined that, where a prisoner is in custody of the *sheriff*, no demand of a plea is necessary, but if he be in custody of the *marshal*, it is necessary. *Per Mr. J. Buller. Rose v. Christfield, 1 Term Rep. 591.*

If you forget to sign judgment within the time limited by the rule, you may, in the next term, give a fresh rule, and for want of plea, sign judgment.

N.B. The words of the rule are to proceed to trial or final judgment, within three terms next after declaration delivered; the term wherein such declaration shall be delivered is to be taken as one, *R. H. 26 Geo. 3.* You must sign final judgment on or before the last day of the third term; and after final judgment signed, the prisoner must be charged in execution, within two terms next after such judgment so had and obtained, the term in which the judgment is signed to be accounted one of the two terms, *R. H. T. 26 Geo. 3.* unless prevented by error or injunction.

Make out a *ca. sa.* and lodge it with the sheriff of the county, which is sufficient, pay him 2s. 4d. (and it is absolutely necessary that the judgment be entered, docketed, and filed of record, before this is done).

If a *ca. sa.* be returnable on the *Ascension-day*, and prisoner be charged therewith, a judge will discharge him out of custody. *Mr. J. Buller* did this.

If the defendant be in custody in *Newgate, Ludgate*, or any other county or city gaol, at the suit of any other person, the plaintiff must sue out process against him, directed to such sheriff, &c. as the case is, and such process must be left with him at his office, in order to charge such defendant in custody. In this case make affidavit, and sue out writ as in other cases; pay sheriff for charging him in custody 2s. 4d. and such plaintiff must proceed against the defendant as before directed, otherwise he will be superseded; and *N.B.* he is to file a bill in this case before he delivers the declaration. *Sayer's Rep. 49.*

How to proceed if the Defendant be in Custody of the Marshal ats. same Plaintiff.

No prisoner shall be entitled to have day rules above three days in each term: and having a day rule, shall return

No demand of plea in custody of sheriff is necessary.

Rule to plead may be given after the first rule.

Must be charged in execution within two terms.

How to charge defendant in execution in custody of the sheriff.

If *ca. sa.* be returnable on a dies non.

If defendant in custody in *Newgate, &c.* at the suit of any other plaintiff.

Day rules.

How to proceed
if defendant is in
custody of the
marshal.

return within the walls or rules of the prison, at or before nine of the clock in the evening of the day for which such rule shall be granted. *R. E. 30 Geo. 3.*

If the defendant be in custody of the marshal of the *King's Bench* prison, at the suit of the same plaintiff, then make two copies of the bill, one on parchment, the other on paper (treble *id.*), file the bill first, then deliver the copy to the *turnkey*, pay *1s.* and in this case *no affidavit* is requisite; but give a rule to plead, and demand a plea as in other cases. *1 Term Rep. 591.*

When to plead.

When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four days exclusive* before the end of the term in which the writ is returnable, a rule to plead being given, and plea demanded (not on the back of the declaration), the defendant shall plead as of that term, or judgment may be signed; but if the bill be not filed, and the copy delivered *four days exclusive* before the end of the term, the defendant may imparle until the next term. *N. on R. E. 5 W. & M.*

Trial or judgment.

You must also proceed to trial or final judgment within *three terms next* after declaration delivered, accounting that term one, *R. Hil. 26 Geo. 3.*; and also charge defendant in execution, within *two terms* after final judgment signed, accounting that term as one, unless prevented by error or injunction. *Ibid.*

Declaration
against a prisoner
in custody of
the marshal, by
bill.

Middlesex, (fs.) A. B. complains of *C. D.* being in the custody of the marshal of the *Marshalsea* of our lord the king, before the king himself: *For that whereas.* Add pledges; you proceed as in other cases to sign judgment, if no plea, &c.

How to charge
in execution in
custody of
marshal.

Get a rule from the clerk of the rules for the marshal to acknowledge defendant in his custody, pay *5s. 6d.* take same and leave it at the marshal's house with *10s. 6d.* he will write his acknowledgment thereon, which get from him, then take a piece of parchment without a stamp, in the shape of a bail-piece, and enter the *committitur* thereon thus:

Michaelmas Term, 37 Geo. 3.

Mansfield and Way.

Committitur
piece.

Middlesex, to wit. Richard Fenn is committed to the custody of the marshal, &c. in execution, at the suit of *John Denn*, in a plea of trespass on the case, for *45l.* damages, there to remain until, &c.

R. R. attorney.

Judgment of Trin. Term,
36 Geo. 3. Roll. 566.

There

There is a book kept in the *K. B.* office called the marshal's book, in which are entered the names of persons charged in execution previously to their being so charged. But this is a book of no authority; and only meant for the marshal's convenience, that he may readily see what persons are charged in execution; so that it is (in truth and reality) only a memorial of the defendant's being charged in execution in custody of the marshal; and not the *cause or foundation* of such charge and detainer. *Hutchins v. Kendrick*, 2 Burr. 1049. This has been adhered to in a late case before Lord *Kenyon*, and he held it *not necessary* on the master's certificate, and refused to discharge the prisoner for want of such entry.

Take *committitur* to the clerk of the judgments, and file it with him *before the last day of the term* in which you are to charge defendant in custody, as he must enter it on the roll, or defendant is supersedeable; 4 Burr. 1481. *Fotterell v. Philby*, pay him 2s.; it is usual to enter the *committitur* in the marshal's book, at the same time, before you deliver it over, pay 6d.

The *committitur* must be actually entered *on record* before the end of the second term. 2 Str. 1215. *Unwin v. Kerchoffe*, 4 Burr. 1841.

A prisoner in custody at the *suit of the king*, cannot be charged with *civil process*, without leave of the court or one of the judges. But where the defendant is in custody on an attachment for non-payment of costs, and charged with a civil action also, the court consider such an attachment to be only a civil execution, and therefore held that he might be charged in execution in the action without leave of the court. *Bonafous v. Schole*, 4 Term Rep. 316.

Judgment obtained (and affirmed on error); execution sued for 606l. which was 5l. more than was really due; rule obtained why defendant should not be discharged, which was made absolute. Pending this rule the defendant was charged in custody for the real debt, upon which this court was moved why the commitment of defendant should not be set aside for irregularity? Held, that as there was no affidavit that the plaintiff had given notice that the first commitment was abandoned, pending the former rule; and a second commitment for the same cause before

If in custody at the
of the king.

If on an attachment.

Plaintiff must give notice of his having abandoned a former commitment, which is erroneous, before he enters a second.

the first was discharged, is clearly informal. Rule absolute. *Topping v. Ryan*, 1 Term Rep 227.

Acknowledgment to be of the same term defendant is charged,

Court held that the acknowledgment by the marshal ought to be of the *same term* in which the defendant is charged in execution, and that an acknowledgment *two terms preceding* is not sufficient according to the practice. *Fisher v. Stanhope*, 1 Term Rep. 464.

If defendant be charged.

If the defendant be charged in execution, and afterwards plaintiff dies, the executors need not revive the judgment, or charge the defendant *de novo*; for the execution is considered as executed. *King v. Millett*, H. 22 Geo. 3. *Tidd* 211.

If plaintiff proceeds faster than by the rules.

If the plaintiff proceeds faster in his cause than by the rules prescribed, and obtains a verdict, he must charge the defendant in execution the term after the *distringas* is returnable, or he may be superseded.

By way of Detainer for a new Plaintiff.

Charging in custody of the marshal by way of detainer for a new plaintiff.

For preventing the detainer of prisoners charged by declarations in the custody of the marshal of the *Marshealsea* of this court, where the cause of action against such prisoner does not amount to 10l.; *It is ordered*, That no declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against such prisoner does amount to 10l. or upwards, shall be first made and filed with the clerk of the rules of this court, and *the sum specified in such affidavit shall be indorsed by him upon such declaration, before leaving thereof with the turnkey.* R. E. 15 Geo. 2.

How to proceed.

File a bill (*if in vacation*) as of the preceding term, then make affidavit of your debt if above 10l. which is to be sworn before a judge (or Messrs. *Provost* and *Webb*), take a copy on treble penny stamp paper of the bill with you, and the affidavit to the clerk of the rules, he will indorse on the declaration the sum sworn to, leave the affidavit with him, pay filing 3s. The bill must be *filed first*, then the declaration, so marked, must be delivered to the defendant, or left with the turnkey of the *King's Bench* prison, pay him 1s. he will acknowledge defendant in custody, then proceed as before. 2 Burr. 1052.

File memorandum or warrant on a 2s. 6d. stamp with the bill.

Rule to shew cause why proceedings should not be set aside for irregularity. It appeared that the defendant was in custody at the suit of same plaintiff for another cause of action. The *lat.* in this second action (which was notailable) was returnable on the 28th of January 1786. On that day, the declaration was left in the office, though writ not served till eight that evening. Motion 13th May. Buller J. In *Ward* and *Wilkinson* the court refused to set aside the proceedings, though the notice of declaration was not served until half past ten at night. 2 Burr. 812. Besides, the defendant should have made his application sooner; he is now out of time. If a prisoner be entitled to be superfeded, he must always apply for that purpose; but if he come on a mere irregularity, he is in the same situation with any other defendant. *N. B.* The declaration need not be delivered to the defendant personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff, for the same cause of action; so determined in this case. *Robertson v. Douglas*, 1 Term Rep. 191.

Service of a *latitat* at eight in the evening on the return day, is good, though the declaration be left in the office in the course of the same day.

If the defendant is in custody of any gaoler, &c. For felony, for felony, upon producing the affidavit (sworn before a judge) of the debt, the judge's clerk will give you an order to detain him; in this case affidavit is filed with Messrs. *Provost* and *Webb*, and sue out writ (or, if bill of *Middlesex*, with *Mr. Braithwaite*) as in other cases; take the writ to the sheriff and leave the order; pay 2s. 4d.

If he removes himself to the Fleet.

If a prisoner in custody of the sheriff, by virtue of process issued in this court, or in custody of the marshal before declaration delivered, removes himself to the Fleet prison, the plaintiff has his election to declare against him in the *Common Pleas*, or not; but, in order to declare against him upon the process issued in this court, he must bring him up into court by virtue of an *habeas corpus ad respondendum* to charge him with such declaration, which is directed to the warden, who returns same. The former mode is the least expensive.

Removal before a declaration.

5 Term Rep. 35.

But if such prisoner be in the custody of the marshal, charged with a declaration in this court, and he afterwards removes himself to the Fleet, the plaintiff

If he be charged with a declaration, and removes to the Fleet.

may proceed against him to final judgment in this court; but in order to charge him in execution, plaintiff must bring a writ of *habeas corpus ad satisfaciendum* directed to the warden of the *Fleet*, to bring him into this court returnable on a day certain.

How to proceed by Original against the Defendant in Custody of the Sheriff of any County.

If defendant is in custody of any sheriff, &c. upon a *special capias*, then declare against him by delivering a declaration only, on treble penny stamp paper, thus:

Declaration.

Surry, to wit, *Richard Fenn*, late of, &c. yeoman, was attached to answer *John Denn* in a plea of trespass on the case, and whereupon the said *John Denn* by J. J. his attorney complains, *That whereas* (as in other cases); you do not alledge by original, *in whose custody he is*; but affidavit of the service is required, and proceed the same as by bill afterwards.

If in custody of the marshal.

If in custody of the marshal, declare against him in the same manner, and do not alledge him to be in the custody of the marshal.

Having shewn how prisoners are to be declared against and detained, it will now be requisite to shew when they are to appear and plead.

Within what Time Prisoners have to plead in County Gaols.

If declaration be delivered before one month of Easter, or the morrow of All Souls, defendant to appear in ten days after term.

If he appear, may imparle till next term, except in London or Middlesex, &c.

That upon every arrest on mesne process returnable the first day of *Easter* and *Michaelmas* term, and a copy of the declaration be delivered before *menssem Paschæ*, or *crastinum Animarum*, and affidavit of the delivery thereof made and filed, if the defendant doth not appear before the end of ten days after *Easter* and *Michaelmas* terms respectively, judgment may be entered against him, rules having been given: But if he appears before the end of ten days after the term, he shall imparle until the next term unless the action be in *London* or *Middlesex*, and defendant be in prison within *forty miles* of *London* or *Westminster*; then though he doth appear before the expiration of *ten days* after the end of the term, he shall plead *two days* before the *essoign day* of the *next term*, and in default thereof, rules having been given, judgment may be entered against him as aforesaid. *R. E. 5 W. & M. sect. 3.*

If a copy of a declaration be delivered *against such defendant* on or after *menssem Paschæ* in *Easter* term, or *crastinum Animarum* in *Michaelmas* term, or in *Hilary* or *Trinity* term, and thereupon the plaintiff gives rules to appear and answer; then if the defendant appear two days before the *essoign* day of the next term, he shall imparle until the said next term; but if he does not appear within that time, judgment may be signed. *Ibid. sect. 4.*

But if declaration delivered one month after Easter, or the morrow of All Souls, or in Hilary or Trinity-term, if defendant appears two days before the *essoign* day, &c.

If a writ be returnable in any term, and a copy of the declaration has been delivered before the *essoign* day of the next term, the plaintiff in such next term may give rules to appear and answer, and if the defendant does not appear and plead upon the expiration of the rules, judgment shall be given against him. *Ibid. sect. 5.*

If declaration delivered before *essoign* day of the next term after the return of the writ.

If defendant is in custody of the sheriff, a rule to appear and plead must not be given *before affidavit of the delivery of the declaration is filed*; which must now be filed with the clerk of the rules *before the first day of the next term, after the delivery.* *Rule H. 26 Geo. 3.*

New rule.

If the writ be returnable before the last return of the term, and party arrested and in custody, and the declaration is delivered against a prisoner in custody of the sheriff *four days* before the end of that term, he shall appear and plead in eight days, provided the affidavit is filed in due time after delivery, and rule given.

Construction.

But if not, he has till two days before the *essoign* day of the next term to appear and plead thereto; and in case of neglect to sign the judgment (a demand of plea having been made, if in custody of the marshal) that term, then a common four-day rule to plead may be given the next term, and no plea being filed or delivered, plaintiff may sign judgment (*without a new demand*).

When to plead, two days before the *essoign* day.

A prisoner may, any time pending the action, and before final judgment, file special bail, and justify same, and have a *superseas*, if in the custody of the sheriff; if in custody of the marshal, by a judge's order only.

May, before final judgment, put in bail.

N. B. A justification in *vacation* before a judge, is sufficient upon notice.

The issue now is not paid for.

Issue.

Though a prisoner is superfedable, yet he may be charged with a declaration.

The court held a defendant prisoner, although superfedable, but not *actually superfeded*, if found in custody, may be charged with a declaration at the suit of a new plaintiff. 2 Burr. 1048. *Hutchins v. Kenrick*.

When a prisoner pleads out of the common time he must give notice of his plea being filed; nor is he entitled to be discharged until the end of the 3d term for not proceeding to trial or judgment.

The plaintiff declared against defendant in custody of the sheriff of *Gloucester* in last *Hilary* term: and on 25th Feb. he entered the plea of general issue in the book. The plaintiff did not know of the plea, and of course took no further step. *Motion to discharge him in E. T. for not proceeding to trial within three terms*: It was opposed—1st, because the application was too early: 2d, that the plea must be considered as a nullity, defendant not having given notice of it, and a case was mentioned out of my second edition, in which Mr. J. Buller refused, considering the plea as a nullity. Buller J. I think that the defendant is wrong upon both points. The first would be a sufficient answer to this application, and on the second I have no difficulty in saying, that the defendant should have given notice of the plea. *Rule refused. Thomas v. Prichard, 4 Term Rep. 664.*

When notice of plea necessary to be given, and when not.

If a defendant (prisoner) mean to avail himself of a plea which is filed *before the time*, when by the rules of the court he is compellable to plead, he must give notice of his plea. Buller J.

The rule to appear and plead expired on the 19th of *November*, the defendant entered his plea the 16th Nov. plaintiff signed judgment on the 20th, for want of a plea. *Motion to set it aside*, and the court made rule absolute, the defendant having pleaded in regular time, and held no notice of it was necessary. *Rusholm v. Chapman, 5 Term Rep. 473.*

When Prisoners entitled to be discharged.

Once superfedable, always so, it extends to same process.

The old rule that a prisoner who is once superfedable always continues so, was insisted on. *Per Cur.*—It extends only to the same process; and where the nature of the charge is altered to a charge in execution, it is quite otherwise. *The Lond. Ass. Comp. v. Perkins, 1 Term Rep. 591.*

If a prisoner is once superfedable, and does not take the advantage, he can-

Motion for a *superfedas* for not proceeding to trial or judgment in due time. The arrest was in *August 1783*, by the sheriff of *Kent*; 20th *November*, declaration delivered; 3d *February 1784*, no plea, plaintiff

plaintiff signed interlocutory judgment "*without a demand of plea*;" on the 26th *February*, a plea was filed, defendant having removed himself to the *K. B.*; 15th *July*, plaintiff waived the judgment (there being a dispute respecting the regularity), and gave notice of trial; in *Michaelmas* term following, plaintiff signed judgment, and the day after, charged defendant in execution. *Palmer* shewed cause, and contended a demand of plea was unnecessary (except when the defendant was in court); and if entitled to be superse- ded, he ought to have applied in time. *Buller J.* In the case of a prisoner in this court there must be a demand of plea. If he is in the custody of the sheriff, no demand is necessary. If a prisoner be superse- dable for any irregularity, as for want of the demand of a plea, he cannot take advantage of that, after he is charged in execution, supposing he has any opportunity of applying on that ground, before he is charged in execution. Now here the defendant had ample time; for judgment was signed in *Michaelmas* term 1784, and he might have applied in *Trinity* term following. Rule discharged. *Rose v. Chriestfield*, 1 Term Rep. 591.

not do it after charged in execution.

Ordered, That if no declaration be delivered before the end of the next term after the return of the process, by virtue whereof the prisoner is or shall be taken, &c. and an affidavit made and filed with the clerk of the rules of the delivery, and of the time when, and the person to whom the same was delivered before the first day of the next term after the delivery of such declaration, the prisoner to be discharged by superse- deas, &c. *R. Hil. T. 26 Geo. 3.*

For want of a declaration within two terms, defendant may be discharged.

In case of commitment or surrender to the marshal after return of process, and before declaration delivered, unless the plaintiff shall cause a declaration to be delivered before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given, the prisoner shall be discharged by writ of superse- deas. *Ibid.*

In case of commitment to the marshal.

How to discharge for want of Declaration.

To discharge a prisoner on the plaintiff's not declaring in due time, if in custody of the sheriff, &c. get a certificate from the gaoler of the causes he is charged with, and an affidavit of his having signed

How to discharge prisoner for want of declaring in a county gaol.

same; then take out a summons from a judge, to shew cause why a writ of *superfedeas* should not issue to discharge the defendant; serve same on plaintiff's attorney, and if he does not attend, make affidavit of such service and attendance thereon (as there is but one summons necessary),^a and then the judge will grant an order for a *superfedeas*, upon filing common bail, and the memorandum on a 2s. 6d. stamp is filed with Messrs. *Provost and Webb*; pay summons in term 1s., vacation 2s., order 4s., common bail 1s. 6d., *superfedeas* signing 1s. 8d., seal 7d.

How if in Custody of Marshal.

If in custody of the marshal.

If the defendant is in the custody of the marshal, apply to the clerk of the papers of the *King's Bench* prison, for a copy of the causes whereon he stands charged, then take out summons as before, and serve it on plaintiff's attorney; if he does not attend, an order will be made, upon filing common bail, and the marshal (upon the clerk of the common bail's certificate) will discharge the defendant without a *superfedeas*; pay for it 1s.

If by original.

If the action be by original, then proceed as above, and when you have got the order, file an appearance with the filacer, pay 2s. 6d. and he will make out a *superfedeas* thereon, pay 4s. 10d. signing, seal 7d. if in custody of the sheriff; if in custody of the marshal, he will certify to him, the same as by bill; pay him for certificate 1s.

If a *superfedeas* be had before judgment, yet plaintiff may have execution; aliter for want of charging in execution.

If the defendant be superseded for want of proceedings before judgment, yet the plaintiff may, after judgment obtained, take him in execution; but otherwise, if defendant supersede for want of charging in execution. *N. on R. T. 2 Geo. 1.* If defendant has removed himself before declaration to the *Fleet*, the summons must be taken out in the *Common Pleas* to discharge.

How for want of proceeding to Trial, &c.

Counsel's hand not being set to a replication, Mr. *J. Buller* discharged the prisoner; counsel's hand in this case was requisite.

^a An attendance half an hour next immediately following the return of the summons, sufficient. *Vide* the rule in p. 95. formerly an hour.

Ordered,

Ordered, That in all cases *after a declaration delivered* as aforesaid at the *King's Bench*, or any other *gaol* or *prison*, unless the plaintiff shall proceed to trial, or final judgment thereupon, within *three terms next after such declaration delivered* (if by the course of this court the plaintiff can so proceed), of which *three terms*, the term wherein such declaration shall be delivered shall be taken to be one: or in case of a surrender in discharge of bail, *after a declaration delivered*, unless the plaintiff shall proceed to trial or final judgment thereupon, *within three terms next after such surrender and due notice thereof* (if by the course of the court the plaintiff can so proceed), of which three terms, the term wherein such surrender shall be made shall be taken to be one, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted by this court or one of the judges upon filing common bail, unless upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary. And in all cases after such trial shall be had, or final judgment obtained against any prisoner in the custody of the *marshal*, or in any other *gaol* or *prison*, unless the plaintiff shall cause such prisoner to be *charged in execution within two terms next after such trial shall be had, or final judgment shall be obtained* (of which two terms, the term in which such trial shall be had, or final judgment shall be obtained, shall be taken to be one), in case no writ of error shall be depending nor injunction be obtained for stay of proceedings: and if any writ of error shall be depending, or injunction obtained, *then within two terms next after judgment shall be affirmed*, the writ of error be nonprossed or discontinued, or the injunction dissolved, including the term in which such affirmance of judgment, nonpros, or discontinuance of the writ of error, ^a or dissolution of the injunction, shall be obtained; or in case of a surrender in discharge of bail *after trial* had, or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution *within two terms next after such surrender and due notice thereof*; of which two terms, *the term* wherein such surrender shall be made shall be taken to be one, in case no writ of error shall be depending, nor injunction obtained for stay of proceedings; and if any writ of error shall be depend-

When entitled for want of proceeding to trial or judgment.

In case of a surrender within three terms, prisoner shall be discharged.

After trial had, to be charged in execution in two terms after trial or final judgment, in case no writ of error or injunction.

If any writ of error or injunction, then within two terms after affirmance, &c. or injunction, dissolved.

In case of surrender after trial had, or final judgment to be charged in execution in two terms next after surrender and notice.

If error or injunction, then

^a The defendant is bound to nonpros his own writ of error, the plaintiff not being obliged to proceed in error unless he chooses.

ing,

within two terms next after judgment or affirmance.

ing, or injunction obtained, then within *two terms next after judgment* shall be *affirmed*, the writ of error be *nonprossed* or *discontinued*, or the injunction dissolved, including the term in which such affirmance of judgment, nonpros, or discontinuance of the writ of error or dissolution of injunction, shall be obtained, and the prisoner shall be discharged out of custody by *superse-deas* to be granted as aforesaid, on filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn in either of these cases to the contrary. *R. H. T. 26 Geo. 3.* The rule of *Trin. 2 Geo. 1.* is now at an end.

Explanation of the rule.

For the better understanding of this rule, it may be proper to state the proceedings. If the declaration is delivered in *Hilary* term 1796, the plaintiff must sign judgment the last day of *Trinity* term, and charge defendant in execution the last day of *Michaelmas* term (unless error or injunction).

Surrender in vacation must be before effoign day.

If defendant surrenders to the custody of the marshal in vacation, he cannot account *that* vacation as a term, unless he surrendered *before* the *effoign* day of the term ensuing such vacation.

If writ be against husband and wife, and wife in custody, she shall not put in bail for her husband.

If a writ be sued out against husband and wife, and the wife only be arrested and detained in custody, she shall not be compelled to put in bail for her husband, but may file common bail for herself, and have a *superse-deas* for her discharge; but if the husband only be arrested, he shall put in bail for his wife, as well as himself.

Once discharged, cannot be taken again.

If a defendant has been once discharged out of execution upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. *Vigers v. Aldrich, 4 Burr. 2482.*

Nor if he takes a new security, if it becomes bad by the act of the plaintiff.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques v. Withy, 1 Term Rep. 557.*

How for not proceeding to Judgment, and charging in Execution in Custody of the Sheriff.

How to discharge defendant for not proceeding to

To proceed to discharge the prisoner for not proceeding to judgment, or charging in execution in due time,

time, apply, if the defendant is in custody of the sheriff, to the gaoler for a copy of causes; get an affidavit of his having signed the same, and that the name thereto is his hand-writing; then take out a summons at a judge's chambers to shew cause, which serve on the plaintiff's attorney. If he does not attend, you will upon the third summons have an order of course, on an affidavit of the service and due attendance; but if he should attend, and it is a country cause at a distance, the first is an order *nisi*, within a limited time; giving time to the agent to write to his client, and then an order absolute, if no cause shewn; the agents in town generally indorse the summons, unless cause shewn in a week, &c

judgment and execution, in custody of the sheriff.

Upon the order in either case being made, issue out a writ of *superfedeas* for his discharge; which see hereafter.

On issuing *superfedeas* in this case, file a memorandum or warrant on a 2s. 6d. stamp, as directed by *stat. 25 Geo. 3. c. 80*; the bail-piece is left with the judge's clerk.

If the plaintiff recover a judgment against two defendants in the *King's Bench*, and one of them bring error in the *Exchequer-chamber*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of *K. B.* notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. *Laroche v. Wasbrough* 3 *An. 2 Term Rep.* 737.

As to where a writ of error brought.

In such case where the judgment was affirmed in the *Exchequer-chamber*, and costs given of the writ of error, and both defendants were taken under a writ of execution on the whole sum including the costs of the writ of error, as well as the original sum recovered, this court permitted the plaintiff to amend his *commititur in execution* as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *Ibid.* If there be a removal after declaration, and defendant is to be discharged for want of proceeding to trial or judgment, the court where the declaration is, will discharge him.

Court permitted an alteration in the *commititur* piece, although filed.

If there be a removal after declaration.

In Custody of the Marshal.

If the defendant be in custody of the marshal, then get copy of the causes from the clerk of the papers of the

In custody of the marshal.

By original.

the *King's Bench* prison (no affidavit is necessary of his signing), take out summons as before, and attend; if you obtain an order, file bail with the clerk of the common bails if by bill (*if by original*, enter appearance with, and obtain a certificate of the filacer), who will give certificate for the discharge.

In the *King's Bench*.

A. B. plaintiff,
and

C. D. defendant.

Affidavit of service of the summons.

J. C. of, &c. gent. maketh oath and saith, That he did, on the day of last past, serve a true copy of the summons hereto annexed, on Mr. *H. I.* who acts as attorney or agent for the plaintiff in this cause, by leaving the same at the house of the said *H. I.* in with the clerk or servant there. And this deponent further saith, That he did also serve Mr. *H. I.* with another true copy of the summons hereto annexed, on the day of last, by leaving the same with the clerk or servant of the said *H. I.* at his house aforesaid. And this deponent did also, on the day of last, personally serve the said *H. I.* with a true copy of the summons hereto annexed. And this deponent further saith, That he did, on the several days mentioned in the said summons, duly attend at the chambers of the ^a right honorable *Lloyd lord Kenyon*, in *Serjeant's-Inn, Chancery-lane, London*, but no one attended on behalf of the said plaintiff.

^a Honorable
Mr. Justice
Grose.

May get plaintiff's attorney to consent.

It is very common to save this affidavit and the three summonses, by getting plaintiff's attorney to go to the chambers; and the clerk will make an order upon hearing. If it is a country cause, the order will be *nisi*, unless cause be shewn in a reasonable time (generally a week).

Attorney should be present on prisoner's signing a *cognovit*.

It is improper to take a *cognovit* from a prisoner without his attorney being present, and if done, the proceedings may, on that ground, be set aside, but *not for irregularity*. *Parkinson v. Caines*, 3 Term Rep. 616.

H.b. corp. brought by plaintiff to remove his prisoner, quashed.

The plaintiff arrested defendant in the *Marshalsea* court, and had him in custody there; the plaintiff brought a *habeas corpus* to remove him into the *K. B.* to charge him with the same demand. Motion to quash the writ made absolute. *Melfome v. Gardner*, Corp. Rep. 116.

Writs

Writs of Superfedeas.

This writ is a command to stay or forbear some ordinary proceedings in law, which in appearance, ought to be done, or pursued, were it not for the cause whereon it is granted.

George the third, &c. to the sheriff of *Kent*, greeting: Whereas it was lately commanded, that you should take *Richard Fenn*, if he might be found in your bailiwick, and keep him safely, so that you might have his body before us at *Westminster*, on *Wednesday* next after fifteen days of *Easter*, to answer to *John Denn*, in a plea of trespass, and also to a bill of the said *John*, to be exhibited against the said *Richard*, for 100l. upon promises, according, &c. and because the said *Richard* came into our court before us, and hath filed common bail in the said action, and the said *John* not having declared against him, within two terms next after the said taking; therefore we command you, that you wholly cease from taking, arresting, or imprisoning, the said *Richard*, or any ways molesting him on that occasion, and no other; and if you have taken him on that account, and no other, and do detain him, that then you cause him to be delivered without delay, from the prison wherein he is so detained, at your peril. Witness *Lloyd lord Kenyon*, at *Westminster*, the 15th day of *June*, in the thirty-sixth year of our reign.

Superfedeas for not declaring.

To be engrossed on a 3s. 6d. stamp parchment.

Mansfield and Way.

Kent, (ss.) Superfedeas for Richard Fenn, ats. John Denn. *Præcipe.*
I G. attorney.

Pay signing with Messrs. *Provest* and *Webb* 1s. 8d. seal 7d. sheriff's fee in *London* and *Middlesex* 2s. 4d.

The above *superfedeas* will do by original, only go as far as a plea of trespass, and add, "on the case on promises to the said A. his damage of fifty pounds; and because the said *Richard* came into our court before us, and appeared in the said action, and the said A. not having declared, &c." as above. Pay signing with the filacer, 3s. 10d. seal 7d. *By original.*

George the third, &c. to the sheriff of *Oxfordshire*, greeting: Whereas *A. B.* is detained in our prison, under your custody, by virtue of a certain writ of *latitat*, returnable on, &c. to answer *C. D.* in a plea of trespass, and also to a bill of, &c. And whereas

The like for not proceeding to trial and judgment.

the said *A.* afterwards, in *Hilary* term last past, was charged with a declaration at the suit of the said *C.* in the plea aforesaid; but because it appears to us that the said *A.* hath filed common bail to answer the said *C.* in the plea aforesaid, and that the said *C.* hath not proceeded to judgment against the said *A.* within *three terms* next after the delivery of the said declaration, as required by the rules of our said court; we command you that you wholly cease from taking, &c. as in the other.

For not charging
defendant in ex-
ecution,

George, &c. as in the other, as far as "*plea aforesaid*," then say, "and because the said *C.* hath not proceeded to charge the said *A.* in execution, within *two terms* next after judgment obtained, according to the rules of our said court, before us, we therefore command you, that you wholly cease," (as in the other).

On putting in
good bail.

Say (after recital of the writ), and because it sufficiently appears to our said court before us, that the said *C.* hath found sufficient bail, to answer the said *A.* in the plea aforesaid; therefore we command you, that if the said *C.* is detained in our said prison in your custody, by occasion of the said action, and no other, then you permit him to go at large, as you will answer the contrary at your peril. Witness, &c.

Of the Habeas Corpus ad respondendum.

An *habeas corpus ad respondendum*, is when any one is imprisoned at the suit of another, upon a legal process in the *Fleet* or any other prison (except the *King's Bench* prison), and a third person would sue that prisoner in the court of *K. B.*, and cannot because he is not in custody of the marshal. In this case he may have this writ to remove him out of the prison where he is, into this court, returnable at a day certain, to answer the plaintiff in this action here.

The first thing to be done is, prepare an affidavit of the debt, get it sworn before one of the judges of this court, then sue out a writ of *hab. corp. ad respondendum* directed to the proper gaoler, in whose custody defendant is, sign it with Messrs. *Provost* and *Webb*, and seal it, leave it for the return, it is to be made returnable on a day certain, pay for return, attend at *Westminster* on the return day, have a declaration prepared

pared ready engrossed to give the master in court, he will charge the defendant therewith.

N. B. A bill should be filed, and rule to plead given as in other cases, and demand of plea made.

George the third, &c. To the warden of our prison of the *Fleet*, greeting: We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before us at *Westminster*, on

The *habeas corpus ad respondendum*.

next after to answer *A. B.* in a plea of trespass, and also to a bill of the said *A. B.* to be exhibited against the said *C. D.* for 50*l.* upon promises, and then and there to do and receive all and singular those things which our said court before us shall then and there consider of him in this behalf; and have you there then this writ. Witness *Lloyd* lord *Kenyon* at *Westminster*, the day of in the 36th year of our reign.

Mansfield and Way.

Oath for 2*5l.* } *J. K.* attorney.
per affidavit filed.

Debtors in Execution.

*How to be discharged on the 32 Geo. 2.
c. 28. & 33 Geo. 3. c. 5.*

IF any person shall be charged in execution for any sum not exceeding 100*l.* and minded to deliver up to the plaintiff all his estate, he may, before the end of the first term which shall be next after he shall be charged in execution^a, exhibit a petition to any court from whence the process issued, upon which any such prisoner was or were taken and charged in execution as aforesaid, or into the court, or where he is removed by *habeas corpus*, setting forth not only a true account of his real and personal estate, which he, or any in trust for him, is, was, or were entitled to, at the time of his petitioning; and of all incumbrances affecting same, but also a true account of all the real and personal estate

Debtor charged in execution for any sum not exceeding 100*l.* &c. may exhibit a petition to the court.

Certifying there, the causes of his imprisonment, with a schedule of his real and

^a The act does not extend to *qui tam* actions. *Burr.* 1322. *Black* 372.
which

personal estate,
at the time of
his first impris-
onment.

Fourteen days
previous notice
of such intended
petition to be
given to the cre-
ditor, or his at-
torney, with a
copy of the
schedule.

Affidavit of the
service of such
notice to be de-
livered with the
petition; and a
rule to be made,
&c.

Oath being
made of the ser-
vice of the rule,
the court to exa-
mine.

Creditor disbe-
lieving the oath,
&c.

Objection to
schedule.

which he, or any person in trust for him, or for his use, was or were interested in, or entitled to, at the time of his first imprisonment, either in possession, reversion, remainder, or expectancy, to the best of his belief; and the duties, bonds, notes, and books relating thereto, with the names and places of abode of the witnesses. And before it be received, such prisoner shall give or leave, or cause, &c. unto and for all and every the creditors at whose suit he shall stand charged in execution, or his or her executors, &c. at his or their usual place of abode, or to or for his attorney or agent last employed in any such action, in case any such creditor cannot be met with, but not otherwise, 14 days at least before any such petition shall be presented and received, a notice in writing, signed with the proper name or mark of such prisoner, importing therein, "That such prisoner doth intend to petition the court as aforesaid. And also setting forth a true copy of the account or schedule, including the whole real and personal estate which he doth intend to deliver (other than and except the necessary wearing apparel and bedding of the prisoner, and his, her, or their family, and the tools or instruments of his trade or calling, not exceeding 10l. in the whole)."

Affidavit of service to be left with petition, and read; and a rule to be made for bringing the prisoner into court, and summoning the creditor to appear personally, or by attorney, at some certain day to be specified; and the creditor appearing or not in person, or by attorney, then upon affidavit of the due service thereof being made on him, or his attorney, if any such creditor, his, her, or their executors, &c. cannot be met with, such court shall examine into the matter, and order an assignment of his effects. But if the creditor shew cause, and desire further time to inform himself, court may remand the prisoner, and direct him to appear, &c. on some other day at furthest within the first week of the next term, but sooner if court think fit. And all objections which shall be made *in form* against prisoner's schedule, shall be made only the *first time* he shall be brought up. And if creditor doth not appear on *second day*, &c. or appearing, and shall not be able to discover any effects omitted, then prisoner to be discharged on executing an assignment of his estate and effects unless the creditor agree by

writing

writing signed to pay 2s. 4d. as court shall think fit to be paid *Monday in every week*, so long as he shall continue in prison at his suit. But upon failure of payment, the prisoner, on application, to be discharged, &c. Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. *Sect. 14.*

Prisoners charged in execution in country and other gaols, to proceed in like manner. *Sect. 15.*

The defendant was charged in execution 16th *October* 1789. *Michaelmas* term following he had given the proper notice to plaintiffs to be discharged under the lords' act 32 *Geo. 2.*, but having employed an agent to pursue the subsequent steps necessary to entitle himself to take advantage of the act, which the agent had failed to do, he had been in consequence remanded. In *Michaelmas* term 1790, he made a similar application by virtue of 26 *Geo. 3. c. 44.* the only question was, Whether, under the 5th section, he could make oath that he had neglected to take advantage of the former statute from ignorance or mistake? Lord *Kenyon* said, even if the neglect arose from the misconduct, and not merely from the ignorance or mistake of a third person, I should think that as to the party himself it was fairly referable to the words and meaning of the act; as to him it may be called ignorance or mistake if he fairly meant to do what the law required of him. And *Buller J.* said, even if the neglect were wilful on the part of the agent employed, yet if the defendant were not privy to it, but did every thing in his power to comply with the requisitions of the act, it is as to him imputable to mistake. Ordered, that the prisoner be brought up. *Pearce & an. v. Taylor*, 4 *Term Rep.* 235. The wording of the act was with a view to prevent a defendant taking advantage of any wilful neglect or misconduct of his own. Per *Ashurst J.* The words "*ignorance or mistake*," in contradistinction to fraud and deceit. *Grose J.*

By stat. 33 *Geo. 3. c. 5.* "Every person that now or hereafter shall be in execution for any sum not exceeding 300l. shall be entitled to the same relief as by the above recited act."

"That every person now in execution for any sum exceeding 100l., and not exceeding 300l., shall be entitled to such relief, notwithstanding the time limited by the 32 *Geo. 3.* for such person to apply is

T t

" or

Prisoners charged in execution in the country.

A prisoner who has lost the benefit of the lords' act 32 *Geo. 2. c. 28*, by the misconduct of an agent, may afterwards be discharged under 26 *Geo. 3.*

New act extending it to 300l.

Creditor to have the like remedy as in former act to compel debtor to deliver up his estate.

Extends to non-payment of costs taxed, and to writ of excommunicato capi-endo, or process grounded for costs in the ecclesiastical court. If debtor neglect to take the benefit of 32 Geo. 2. or of this act in time, and shall make it appear to the court.

But creditor may file interrogatories before the taking the benefit of the act.

Not to extend to debts owing to the crown. Nor to affect proceedings under a commission of bankrupt. Nor to Scotland. To continue in force five years.

“ or may be expired; provided such person shall
“ make such application at any time before the end
“ of *Easter* term next. *Seet. 2.*

“ That every creditor or creditors, his or their
“ executors, &c. at whose suit any debtor shall be
“ charged in execution for any sum not exceeding
“ 300l., shall have such remedy by compelling such
“ debtor to deliver up his or her estate and effects
“ for the benefit of his or her creditors as is provided
“ by the 32 *Geo. 2.* in cases where the sum for which
“ such debtor shall be in execution does not exceed
“ 300l. *Seet. 3.*

“ This act extends to persons not paying of costs
“ duly and regularly taxed and allowed by the pro-
“ per officer after proper demands made for that pur-
“ pose; and also upon any writ of *excommunicato ca-*
“ *piendo*, or other process for or grounded on the
“ non-payment of costs or expences, in any cause or
“ proceeding in any ecclesiastical court. *Seet. 4.*

“ That were any debtor as aforesaid shall have
“ neglected or shall neglect to take the benefit of the
“ 32 *Geo. 2.* or of this act within the time limited
“ by the said act, or this act, and shall make it ap-
“ pear to the court out of which such execution issued,
“ that such neglect arose from ignorance or mistake, such
“ debtor shall then be entitled to take the benefit of
“ the said act, or of this act, as if he or she had taken
“ the same *within the time* by the said act, or this act,
“ so limited as aforesaid: provided that it shall be
“ lawful for any creditor, &c. at whose suit any
“ debtor shall be so in execution, to file interrogato-
“ ries for the examination of such prisoner before his
“ or her being admitted to take the benefit of this
“ or the before recited act; that this act shall not ex-
“ tend to any debt owing to the crown, nor shall it
“ affect any proceeding which at any time may be
“ lawfully had under or by virtue of any commission
“ of bankrupt; nor shall it extend to *Scotland*; and
“ to continue and be in force for *five years*, and from
“ thence to the end of the then next session of parlia-
“ ment, and no longer.” *Seet. 5.*

In the *King's Bench.*

John Denn against *Richard Fenn.*

John Denn,

The notice.

Take notice that I intend, after the expiration of
fourteen days from the date hereof (or so soon after as
I can

I can be heard), to petition his majesty's court of *King's Bench* at *Westminster*, for such relief and benefit as I am entitled to by virtue of an act of parliament made and passed in the thirty-second year of the reign of his late majesty king *George* the second, intituled, "An act for the relief of debtors with respect to the imprisonment of their persons," &c. and also of an act made and passed in the 33d year of the reign of his present majesty, intituled, "*An act for the further relief of debtors*," &c. and that I have no debts, estates, or effects whatsoever, nor had I at the time of my first imprisonment in this action, or at any time since, either in possession, reversion, remainder, or expectancy, other than and except (^a *what is contained in the schedule or inventory hereunder written*) the necessary wearing apparel and bedding for myself and family, and the tools or instruments of my trade or calling, not exceeding the sum of 10l. in value in the whole; as witness my hand this day of 1796.

Witness *J. G.**R. F.*

A schedule or inventory of all the estate and effects which I R. F. a prisoner in execution, in the custody of J. B. esquire, Sheriff of the county of Berks, at the suit of J. D. or any person or persons in trust for me, was or were possessed of, or entitled unto, at the time of my first imprisonment, at the suit of the said J. D. or at any time since, either in possession, reversion, remainder, or expectancy, other than and except the necessary wearing apparel and bedding of or for me and my family, and the tools or instruments of my trade or calling, not exceeding 10l. in value in the whole; as witness my hand this day of 1796.

Schedule.

^b The marshal of the Marshalsea.

Real estate.—I have none, either in possession, reversion, remainder, or otherwise.

Goods.—One old chair; six pewter plates.

Debts.—*J. W.* of *Oxford*, labourer,

£. 200

Witness *J. G.**R. F.*

N. B. The notice, petition, schedule, and affidavits are now printed, and may be had at the clerk of the rules, which will save a great deal of trouble.

To the Right Honorable Lloyd Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench, at Westminster, and the rest of the Justices of the same Court.

The humble Petition of Richard Fenn,

Sheweth,

Petition.

^a the custody of the marshal of the Marshalsea.

That your petitioner is a prisoner in ^a his majesty's gaol in and for the county of Berks, in execution at the suit of John Denn, for the sum of 40l. debt, and 63s. damages, as by the certificate annexed more fully appears.

That your petitioner humbly apprehends he is entitled to the benefit of an act of parliament, made and passed in the 32d year of the reign of his late majesty king George the second, intituled, *An act for the relief of debtors, with respect to the imprisonment of their person, &c.* and also of an act made and passed in the 33d year of the reign of his present majesty, intituled, *An act for the further relief of debtors, &c.*

That your petitioner hath not at the time of exhibiting this his petition, nor had he at the time of his imprisonment in this action, or at any time since, any debts, estates, or effects whatsoever, either in possession, reversion, remainder, or expectancy, other than and except ^b (what is mentioned and contained in the schedule or inventory hereunto annexed) the necessary wearing apparel and bedding for himself and family, and the tools or instruments of his trade and calling, not exceeding the sum of ten pounds in value in the whole.

^b If a schedule.

" Your petitioner being willing and desirous to
 " conform himself to the direction of the said
 " several acts, most humbly prays your lord-
 " ships, to grant a rule or order of this ho-
 " norable court, for the plaintiff to shew
 " cause why he should not be discharged pur-
 " suant to the said acts, and as in duty bound,
 " your petitioner will ever pray, &c. R. F."

If there is a schedule, intitle it thus, *A schedule or inventory of all the estate and effects which I R. F. a prisoner in execution in the custody of the sheriff of the county of Berks, at the suit of John Denn, or any person or persons in trust for me was or were possessed of, or entitled unto, at the time of my first imprisonment, at the suit of the said John Denn, or at any time since, either*

in possession, reversion, remainder, or expectancy, other than and except the necessary wearing apparel and bedding of or for me or my family, and the tools or instruments of my trade or calling, not exceeding ten pounds in value in the whole; as witness my hand, this day of 1796.

Here state the things particularly: if notes or bills, the dates and sums.

N. B. This petition will serve for a prisoner in a county gaol, as well as in custody of the marshal.

J. G. of, &c. gentleman, maketh oath and saith, That he was present, and did see *R. F.* the above-named defendant sign his name (or mark), to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same; and that the name *J. G.* subscribed as a witness thereto is of the proper hand-writing of this deponent.

Affidavit to be annexed. Put the title of the cause.

A. B. of, &c. maketh oath and saith, that he this deponent did, on the day of instant, serve the above-named plaintiff *A. B.* with a true copy of the notice (and schedule hereunto annexed), by delivering the same to *E.* the wife of the said *A. B.* at his dwelling-house, or place of abode, situate in in the county of

Affidavit of service of the notice and schedule.

Prisoners are brought up for this purpose at half past nine in the morning at *Westminster-hall*.

If defendant be in custody of any other gaoler (except the marshal), then there must be an affidavit of seeing the gaoler sign the certificate, which will be as follows (and the affidavit of the service of the rule, as well as that of seeing the gaoler's certificate signed, may be included in one affidavit):

Saith, that he this deponent did on the day of instant^a, serve the above-named *John Denn* with a true copy of the rule hereto annexed, by delivering the same to the wife of the said *John Denn*, at his dwelling-house, or place of abode, situate in in the county of

Affidavit of service of rule.

J. F. of, &c. maketh and oath and saith, that he did see *A. D.* the keeper of his majesty's gaol or prison of, &c. sign the certificate hereto annexed, and that the name *A. D.* set and subscribed at the foot

Affidavit of seeing the gaoler sign.

^a Personally serve the above-named *John Denn* with a true copy of the rule hereto annexed.

of the said certificate is of the proper hand-writing of the said *A. D.*

How to proceed.

The petition and affidavit are to be engrossed on paper *without a stamp*, and to be sworn in town before a judge (pay nothing); in the country to be sworn before a commissioner; annex also a copy of the cause from the gaoler (if in custody of the marshal, the clerk of the paper certifies). After affidavit sworn, leave it at the clerk of the rules, who will make out a rule to bring up the defendant, and for the plaintiff to appear, pay 2s. 6d.; serve a copy on the plaintiff, and also on the gaoler, of which affidavit is to be made on plain paper; annex the rule to the affidavit. If at the assizes, the affidavit is produced there, of the service of the rule.

It seems the plaintiff (or his attorney, if the plaintiff is not to be met with) is to be served personally with the notice or rule.

Plaintiff's attorney cannot sign a note.

Plaintiff's attorney appeared, and offered to sign a note for 2s. 4d. *per week*, to be allowed defendant in order to continue him in prison in execution at the plaintiff's suit: held not sufficient.

Objections to the schedule in point of form, to be made the first time.

All *objections* as to the *insufficiency* of a prisoner's *schedule* of his effects in point of *form*, are to be made *on the first attendance*: the second time the prisoner is brought up, the plaintiff must be prepared to falsify the account given by defendant of his effects, if he can; if not, he will be discharged.

Groats must be made payable on every Monday.

The groats must be made payable, and be paid every *Monday*, whatever may be the day on which the defendant is brought up to be discharged, and is remanded at the instance of the plaintiff. *Dough. Rep. 68. Lench v. Pargiter.*

And a judge's order made after term for his discharge is final. *Ibid.* Court said, in future let all the notes be made payable on the *Monday*. *Ibid. 69.*

C. D. } I hereby promise to pay and allow to
v. } *A. B.* 2s. 4d. *per week*, weekly on *Monday*
A. B. } day in every week, for so long time as he
shall continue in prison, in execution at my suit; as
witness my hand, this 15th day of *June 1796.* *C. D.*

Witness *J. G.*

If the plaintiff cannot attend,

If the plaintiff cannot attend he may sign it, and his attorney may make affidavit of his having signed it in his presence, and his witnessing the same, and if

if delivered at the time of his discharge, it will do. But it must be delivered in court.

The note may be had at the clerk of the rules office, ready printed on a 6d. stamp.

It appeared the groats had not been paid till a quarter past ten, and then given to the turnkey on the felons side, who received them; but defendant refused to accept them, saying, they had not been tendered in time. Motion for discharge; the court held that the tender came too late, and the latest hour still continues to be ten. They also held that the turnkey on the felons side was not the proper person who ought to have received the money; it must be the turnkey on the debtor's side. *Prisoner disch. Fisher v. Bull, 5 Term Rep. 36.*

To be discharged if groats not paid by ten in the evening.

The court held, that although the turnkey on the debtors' side received a *French* half-crown, which the defendant refused to accept, it was a good payment, the turnkey making no objection. *Ibid.* in note 37.

French half-crown.

I find now the groats are to be paid to the turnkey only, and not the prisoner.

To be paid to turnkey.

The prisoner had given notice in a former term, to be discharged pursuant to this act above fourteen days, but nothing being done therein, by reason that he had not annexed a schedule in the requisite form to the notice (though he had in reality no effects); upon this discovery he gave a new notice, having then only thirteen days remaining, unless the first and last were both included; question was, whether he should be discharged? Mr. Justice Yates observed, that upon returns to writs of *mandamus* and *sci. fac.* the rule was, that there must be fifteen days between the teste and return, and yet in practice there were only fourteen days, one of the first or last always being included; so upon a *superfedeas* for want of declaring before the end of two terms, one of the two is always included. By analogy therefore to these instances, he thought the court might, in favor of liberty, make the computation in the present case, so as to include one of the days: he chose however to lay hold of the circumstances of the first notice, and said there was no surprise on the plaintiff, nor any intention of surprising him, though he acknowledged, that, strictly speaking, *two insufficient notices* could not amount to *one good one*. Mr. Justice Willes coming into the same sentiment, and plaintiff's attorney not

Fourteen days notice given, both days inclusive.

Prisoner discharged upon circumstances.

disputing it, the prisoner was discharged. 4 *Burr.* 2525. *Morley v. Vaughan.*

Penalty of bond the debt in law, therefore court will not discharge under an insolvent act, if charged in execution for the whole penalty, amounting to 1000l.

Although a prisoner escape in execution, and be retaken, yet he may take the benefit of one of the acts,

If an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited: and if defendant be charged in execution for the whole penalty 1000l. court will refuse to order that sum to be reduced to the sum actually due for such arrear, in order for defendant to take benefit of 34 *Geo. 3. c. 69*, the insolvent act; but he may be discharged on payment of the arrear. *Judd v. Evans*, 6 *Term Rep.* 399. Vide 2 *Str.* 1028. *Dougl.* 97. 3d edit.

Defendant taken in execution on a *ca. sa.* returnable first return of *Michaelmas* term, sued out *Trin.* vacation 1790: he escaped from the officer and was retaken 20th *November*, and carried to the *Marshalsea* prison. In *Hilary Term* 31 *Geo. 3.* he applied to be brought up under the lords' act before Mr. J. Buller at his chambers, for the purpose of obtaining his discharge, but as there was a mistake in the notice, as to the name of the cause, he was remanded. Motion in *Trinity* term 31 *Geo. 3.* that he might be brought up. The court thought the application was made in time, for that the defendant could not be said to be charged in execution, until he was actually delivered over to the marshal: and that 26 *Geo. 3.* which was made in *pari materia*, contained a parliamentary exposition of the words "charged in execution," in the lords' act, for it directs all gaolers and keepers of prisons, to give notice of that act to all persons in their custody for debt, within three days after such person shall have been committed or charged in execution. They therefore ordered the defendant to be brought up, and recommended him to amend the title to the notice. *Vaughan v. Durnell*, 4 *Term Rep.* 367.

If he brings action after his discharge, shall hold money as a trustee only.

If a person who has been discharged by an insolvent act, brings an action and recovers on a promissory note made to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for his assignees. *Dougl. Rep.* 472. *Brown v. Rivers.*

A general judgment by warrant of attorney, will not warrant a special execution under 12 *Geo. 3. c. 23.*

A general judgment signed by virtue of a warrant of attorney given before the passing of an insolvent act, of which the defendant is entitled to take advantage by pleading in discharge of his person, &c. will not warrant a special execution under the

the act of 12 Geo. 3. c. 23. But the court will give the plaintiff leave to plead the insolvent act for the defendant, and sign a special judgment under it, for the warrant of attorney will preclude the defendant from saying there is no debt. *Buxton v. Mardin*, 1 Term Rep. 80.

A defendant in execution for contempt, and for the costs on a *quo warranto* information, may be discharged under the lords' act. The fine is merely nominal, and is now considered as an execution in a civil suit. *Rex v. Pickerill*, 4 Term Rep. 809. Vide *Cow*. 136. 1 Term Rep. 266.

The holder of a bill sued the acceptor and charged him in execution, the latter having obtained his discharge under the lords' act; the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular, the defendant's having been charged in execution at the suit of the holder, not being a satisfaction as between the drawer and acceptor. *Macdonald v. Bevington*, 4 Term Rep. 825. The consequence of the defendant's not being liable in this action would be this, that, because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged, without paying either. Per Buller J.

If in for a contempt, and for costs on a *quo warranto*,

Holder of bill sued acceptor and charged him in execution, the latter having obtained his discharge under the lords' act; holder then sued the drawer, &c.

Proceedings by Habeas Corpus.

There are several writs of *habeas corpus*, to which the subject is entitled by common right, when he is deprived of his liberty. But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, & recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf.

Habeas corpus.

No *habeas corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 Black. Rep. 1324.

Enemy.

The writ of *habeas corpus* in civil cases is a judicial writ issuing out of this court, commanding the sheriff, or other officer to whom it is directed, to have the

^a Writs of *habeas corpus* shall run into any liberties, and into the counties palatine, the Cinque-ports, Wales, Berwick, Guernsey, and Jersey. 31 Car. 2. c. 2. s. 11. Sid. 386. Cro. Jac. 543. 1 Mod. 20. Sid. 431. body

body of the defendant, together with the day and cause of taking and detaining him, before a judge at his chambers *immediately after the receipt*, to do and receive what the court or judge shall consider of him; it is called a *habeas corpus ad faciendum et recipiendum*, though more commonly an *habeas corpus cum causa*, and is granted of common right at all times, whether in term or vacation, without motion. 2 *Mod.* 306. This writ is brought for the removal of the body from the custody of the sheriff to the custody of the marshal; or to remove the cause out of the inferior court into this; or may be had by bail, to bring up the defendant and render in their discharge.

Ha. corp. ad respondendum,

There are other writs of *habeas corpus* in civil cases, viz. the *habeas corpus ad respondendum*, which may be had by a third person against the defendant who is in custody of the warden or other gaoler, to remove him out of the prison where he is, into this court, to answer the plaintiff in the new action therein stated; and which writ is made returnable at a day certain in court.

Also the writ of *habeas corpus ad satisfaciendum* to bring the defendant from the prison of one court, into that of another, in order to charge him *in execution*, upon a judgment of the latter court.

Ha. corp. ad testificandum.

There is also a writ of *habeas corpus ad testificandum* to bring up a person in custody from the prison where he is, to give evidence on the part of the person who sues it. See p. 368.

How to remove the Body from the Custody of the Sheriff to the K. B. Prison.

How to proceed to remove from a gaol or spunging-house, either on a writ issuing out of this court, or an inferior court.

If the defendant be detained on a writ issued out of this court, and wishes to receive the benefit of it (*which is both airy and wholesome*), he may, by getting a creditor to make affidavit of a debt of 10l. or upwards in this court, issue out a writ thereon, and bring a *habeas corpus ad faciendum & recipiendum*, or *habeas corpus cum causa*, which is signed and sealed, and left with the sheriff for his return; when done, he brings up the defendant to a judge's chambers, who commits him to the custody of the marshal.

Formerly this writ could not be returnable immediately unless, &c. but now may.

This writ in the fifth year of *Charles II.* could not be made returnable *immediately*, or in the *vacation*, unless the party was in prison in *London* or *Middlesex*, or in order to deliver him over in discharge of his bail; but since the statute of 4 & 5 *W. & M. c. 21.* which

which gave liberty to a plaintiff (instead of bringing his prisoner to this court at the great expence of the writ of *habeas corpus ad respondendum*), to charge him with a declaration in prison; it has been determined, that in all civil suits, this writ may be had *returnable immediately*, before a judge at his chambers, and may now be sued out, without any previous motion made. *Vide* 3 Burr. 1876. And that the sheriff not obeying it, *Attachment*, &c. will be subject to a penalty, and an attachment for his contempt. 2 Burr. 854.

How to remove the Body from the Custody of the Sheriff, on a Common Pleas Writ, to the King's Bench Prison, or from an inferior Jurisdiction, &c.

If the defendant be detained on a writ out of the *Common Pleas*, and wishes to go to the *King's Bench* prison, he must first obtain a writ out of this court for 10l. or upwards, against him at the suit of a *new creditor*; in that case, an affidavit is to be made of the debt, and a writ sued out, directed to the sheriff in whose custody he is, then issue a *habeas corpus*, which sign and seal, and leave them both at the sheriff's office for a return.

If defendant be detained on a writ from *Common Pleas*.

If he is in custody in an inferior jurisdiction, as the sheriff's court of *London*, &c. then he may bring a *habeas corpus* in the first instance, without a writ being issued out against him.

If in an inferior jurisdiction.

This writ cannot be had by the plaintiff to remove his own cause from an inferior court, for the same debt defendant is detained. *Melfome v. Gardener*, Cowp. Rep. 116.

The *habeas corpus cum causa* is now printed on a 5s. stamp, and may be had at the stationers in blank, and is as follows:

How to sue it out.

George, &c. to the ^a sheriffs of *London*, greeting: We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice, assigned to hold pleas in our court before us, at his chambers situate in *Serjeants-Inn, Chancery-lane*, immediately after the receipt

Habeas corpus:

a The sheriff in whole custody defendant is.

ceipt of this writ, to do and receive all and singular those things, which our said chief justice shall then and there consider of him, in this behalf, and have there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the day of in the 36th year of our reign.

J. K. attorney.

Mansfield and *Way*.

Præcipe.

London, hab. corp. for *C. D.* to do and receive *ret'ble* immediately.

How to proceed.

To be signed by Messrs. *Provost* and *Webb*, pay 6s. 8d. in term time; vacation 7s. 8d. seal 7d. take it to the sheriff's office in whose custody the defendant is, he will make his return thereon, and make a warrant to his officer, to take the defendant before the chief justice, who will commit him; pay 9s. 4d. for the first action, 2s. 4d. for every other, and 2s. 4d. for warrant to deliver, officer 10s. 6d. judge's clerk 8s. 6d.

Any judge may commit.

Though this writ is returnable before the chief justice, yet any other of the judges may commit the prisoner to the *King's Bench* in his absence.

The form of the writ will do in all counties.

The above form will do for all counties, only direct it to the sheriff, &c. in whose custody the defendant is.

Fees in the country.

If you remove a person from the country, the sheriff is paid 1s. *per mile* for bringing him to town, and the judge will not (it is said) commit the defendant, unless the sum is paid; but the officer must obey the writ, though the prisoner refuse to pay his fees. 2 *Str.* 814.

Prisoners committed to remain for two days, now standing any other writ of hab. corp.

Every prisoner who shall be committed to the custody of the marshal of this court, by virtue of any writ of *habeas corpus ad respondend.* or *ad faciend.* et *recipiend.* shall remain in actual custody of the said marshal by the space of *two days* next after such committal of such prisoner to the said marshal, notwithstanding any other writ of *ha. corp.* issuing out of any other court to the said marshal delivered and allowed. *R. H. 5 W. & M.*

Defendant in custody not to be discharged till bail perfected.

If the defendant be returned in custody on a *habeas corpus*, he is not to be discharged until he has justified his bail, which may be done any time before final judgment, and bail may for this purpose in vacation justify before a judge at his chambers.

How

How to remove the Cause from an inferior Court.

Before I proceed to shew the mode how to remove the cause, it may be proper to state the several acts of parliament relating thereto; and first the act 21 Jac. 1. c. 23, being an act to avoid vexatious delays by the removal of frivolous causes, enacts, That where the judge of an inferior court is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus* or other writ, except it be delivered before issue or demurrer joined in the said cause, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action.

Sect. 2.

That no cause, if once remanded to the inferior court by writ of *procedendo*, or otherwise, shall ever afterwards be again removed. *Sect. 3.*

And that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount or exceed the sum of 5*l.* But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards (and then by the course of the court the *habeas corpus* removed both actions together), it is, therefore, by statute 12 Geo. 1. c. 29. s. 3. enacted, That the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the said defendant to a greater amount.

And in order to prevent delays being made in trying causes in inferior courts, which were frequently practised, by the stat. 43 El. c. 5. it is enacted, That such writ of *habeas corpus* shall be delivered to the judge before the jury have appeared, and one of them sworn to try the cause. *Sect. 2.*

By the 19 Geo. 3. c. 70. s. 6, it is enacted, That no cause, where the cause of action shall not amount to 10*l.* or upwards, shall be removed into any superior court, by *habeas corpus*, or otherwise, unless the defendant shall enter into recognizance for the payment of the debt and costs, in case judgment should pass against him; as in *Sect. 5.*

By *Sect. 4.* it is enacted, That in all cases where final judgment shall be obtained in any action in any inferior court of record, it shall be lawful for any of

How to remove the cause from inferior courts.

No suit shall be removed, unless writ be delivered before issue or demurrer joined.

A suit once remanded, shall never afterwards be removed. Under 5*l.* cannot be removed.

Writ of *habeas corpus*, not to be allowed after one of the jurors sworn.

No cause under 10*l.* to be removed into a superior court, unless bail be given for the debt, &c.

If judgment be obtained in the inferior court, and the defend-

ant cannot be
found, how to
proceed.

his majesty's courts of record at *Westminster*, on affidavit made and filed therein, of such judgment being obtained, and of diligent search and inquiry having been made after the defendant, or his effects, and of execution having issued against the person, or effects, are not to be found within the jurisdiction of such inferior courts, which affidavit may be made before a judge or commissioner, and such superior courts to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any county, &c. against the person or effects of the defendant, in the same manner as upon judgments obtained in the said courts at *Westminster*; and the sheriff is authorised to detain the defendant until 20s. be paid to him, or levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff in the inferior court, subsequent to the said judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued.

Upon what conditions execution shall be staid upon any writ of error, &c. for reversing judgment given in an inferior court, where the damages are under 10l.

That no execution shall be staid upon any writ of error to be sued, for the reversing of judgment given in any inferior court of record, where the damages are under 10l. unless such person, with two sufficient sureties, shall first, before such stay made, be bound unto the party for whom any such judgment is given by recognizance, to be acknowledged in the same court, in double the sum adjudged, to be recovered by the said former judgment, *to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be nonprossed) the debt, damages, and costs adjudged, and all costs and damages to be awarded for the same delay of execution.* Sect. 5.

Habeas corpus to remove the cause from the sheriff's court of London. N. B. If from the mayor's court, London, then direct it to the mayor, aldermen, and sheriffs of the city of London.

George the third, &c. To the sheriffs of *London*, greeting: We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before our right trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice, assigned to hold pleas in court before us, at his chambers situate in *Serjeants-Inn, Chancery-lane*, immediately after the receipt

ceipt of this writ, to do and receive all singular those things, which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. *Witness Lloyd lord Kenyon, at Westminster, the day of in the 36th year of our reign. Mansfield and Way.*

To bear teste
in term.

London, ha. corp. for C. D. to do and receive, returnable immediately. T. K. attorney.

To be taken to Messrs *Provost and Webb*, pay *Præcipe*, signing, in term 6s. 8d. in vacation 7s. 8d. seal 7d. take same to the office where the action is entered, and if but one cause, and above 10l. pay 4s. 10d. for the allowance; see to the judge 2s. 4d. mittatis 2s. 4d. I think a memorandum is necessary on a 2s. 6d. stamp, or it must be annexed to the bail-piece.

If it be brought to remove a cause out of the inferior court under 10l. then bail must be put in below, and *two days notice exclusive* given for their coming into that court, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of inquiring into the sufficiency, and upon their entering into a recognizance, before the judge below, *for the payment of the debt and costs*, then the judge will order the allowance of the writ. *Vide stat. 19 Geo. 3. c. 70. s. 5.*

How to proceed
before allowance
is made of habeas
corpus, and ac-
tion be under
10l.

But if the debt be above 10l. then if the defendant is not in custody, he has already given bail in the action, which is bail to render; therefore the cause is of course removed, by the *habeas corpus* being allowed.

If above 10l.

How Plaintiff is to proceed after Cause removed.

After the bail is complete in the court below, the first step the plaintiff's attorney takes is, to apply to one of the judges' clerks for a rule for bail, which is returnable in term, *within four days next after notice*, in vacation *six days next after notice*, pay for same in term 1s. in vacation 2s. Serve defendant's attorney with a copy thereof; and if he does not put in bail within the *four or six days next after service*, nor take out a summons for time to put in bail (which he may do), then the plaintiff may issue out a writ of *procedendo*. *N. on R. H. 10 W. 3.*

How

How to put in Bail.

To apply to the
sheriff for hab.
corp.

If the defendant puts in bail, then he must apply to the sheriff for a return to the *habeas corpus*; for until that be returned, no bail can be put in, as it may appear what the causes are, for which defendant is detained.

No bail to be
put in upon a
habeas corpus
before the writ
be returned.

It is ordered, that no bail shall be put in upon any writ of *habeas corpus* before that writ be returned, and that such bail shall not be taken by any justice of this court, unless that writ, with the return thereof, shall be offered before the said justice, to be filed at the time of putting in thereof. *R. H. 10 W. 3.*

When you have obtained the *habeas corpus* and return, annex a bail-piece thereto, 2s. stamp, and fill it up thus :

Bail-piece on
ha. corp.

Michaelmas Term in the 37th year of the reign
of king George III. *Mansfield and Way.*

London, } *A. B.* is delivered on bail upon *ha-*
to wit. } *beas corpus.*

To *John Doe*, of London, gentleman,
and

Richard Roe, of the same place,
gentleman.

Oath for £. 20.

R. C. attorney.

At the suit of the plaintiff
in the plaint.

Take the bail and *habeas corpus* to a judge's chambers, who will enter them in the following recognizance, if above 10l. on the receipt of a memorandum or warrant to defend on a 2s. 6d. stamp.

Recognizance of
bail on ha. corp.

" *You do jointly and severally undertake, that if the*
" *defendant be condemned at the suit of the plaintiff (or*
" *plaintiffs) in the plaint, that he shall satisfy the costs*
" *and condemnation, or render himself to the custody of*
" *the marshal of the Marshalsea of the court of King's*
" *Bench, or you will do it for him, if under 10l.*" *Vide*
stat: 19 Geo. 3. c. 70. Pay in term 4s. in vacation 5s.

Notice,

Notice is to be given forthwith to the plaintiff's attorney, of the names and additions of the bail, the time when,

when, and the judge before whom the same is put in.
R. M. 1654, sect. 8.

In the *King's Bench*.

John Denn, plaintiff,
 and
A. B. defendant.

Take notice that special bail was this day put in upon the *habeas corpus* issued in this cause, before the honorable Mr. Justice *Grose*, at his chambers in *Serjeants-Inn, Chancery-lane, London*, and the names are *John Doe*, of *London*, gentleman, and *Richard Roe*, of the same place, gentleman. Dated, &c.

Notice of bail
 being put in.

Yours, &c.

R. C. defendant's attorney.

To Mr. *R. T.* attorney for the plaintiff.

Of Plaintiff's further Proceeding.

If the plaintiff's attorney does not like the bail, he may, instead of entering the exception (*as in common cases*), apply to the same judge for a rule for better bail, which is returnable *within four days next after service*, whether in term or vacation. *N. on R. M. 16 Car. 2.* a copy of which is to be served on the attorney for the defendant: if the bail do not justify within the *four days* (provided there are four days in the term left), then a *procedendo* may be issued; but if there be *not four days in term*, then upon the defendant's giving notice to justify *the first day of the next term, before the rule expires*, and the bail justifying on that day, no *procedendo* can issue.

Rule for better
 bail.

It is ordered, that every defendant, not being an executor or administrator, who shall sue out any writ of *habeas corpus* to remove any suit out of any inferior court, shall put in *special bail in all actions whatsoever* (actions for scandalous words and small assaults only excepted), unless one of the justices of this court shall otherwise order. *R. H. 2 Jac. 2.*

That every de-
 fendant not be-
 ing executor,
 &c. upon a ha-
 beas corpus to
 remove inferior
 causes, to put in
 bail.

Of Exception to Bail, and justifying.

If the plaintiff does not accept against the bail, by taking out such rule *within twenty-eight days after the putting in thereof*, then the bail-piece shall be filed by the defendant's attorney, within *four days next after the end of the twenty-eight days*, under the penalty of 5*s.* to the box, *R. M. 16 Car. 2.*; and for the second offence to be struck off the roll.

Exception to be
 within 28 days.

U u

Take

Notice of justification.

Take notice that the bail already put in for the defendant in this cause, upon the writ of *habeas corpus*, and of whom you have had notice, will, on Monday next, justify themselves in open court, *Westminster-hall*, in the county of *Middlesex*, as good bail for the said defendant. Dated, &c. Yours, &c.

R. C. defendant's attorney.

To Mr. R. T. attorney for the plaintiff.

When to be given.

This notice must be given as in other cases of justification, and defendant may add to the bail already put in new bail, and justify as in other cases; make affidavit of the service thereof, and give brief to counsel to move to justify, fee 10s. 6d. court fees 9s. rule for allowance 5s.; serve copy thereof on plaintiff's attorney.

Bail liable to all actions.

The bail are liable in all the actions mentioned in the return of the *habeas corpus*, wherein the plaintiff or plaintiffs shall declare within two terms. *N. on R. Hil. 2 Jac. 2.* And if there be more causes than one returned in the *habeas corpus*, bail must, in that case, be put in for the whole. *Salk. 352.*

If there be more causes than one, a separate bail-piece must be added to each cause.

Cannot sign a nonpros.

Where the defendant removes his cause, he cannot nonpros the plaintiff for want of a declaration, not being bound to follow the defendant. *N. on R. M. 16 Car. 2.*

Of Declaration, Venue, and Plea.

Declaration.

After defendant has justified his bail, the plaintiff may declare against the defendant (or he may declare *de bene esse*, as soon as bail is put in above), and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*. *Salk. 352.* But such declaration must be delivered within two terms, *1 Str. 631.*; or defendant may refuse it. The defendant cannot in this case sign a nonpros for not declaring, as the cause is removed against his inclination. *Davis v. James, 1 Term Rep. 372. N. on R. M. 16 Car. 2.*

Declaration.

The declaration states the defendant to be in the custody of the marshal, as in other cases.

Venue.

If a cause be removed by *habeas corpus*, out of the courts of *Canterbury, Southampton, Hull, Litchfield, or Pool*, which are counties where the judges of *nisi prius* seldom come, if the action be transitory, it must be laid

laid in the county of *Kent, Southampton, York, Stafford, or Dorset*; where the town and county lieth, and that in all causes of removal, be it by *habeas corpus, privilege, or certiorari*, special bail ought to be given. *R. M. 1654, sect. 9.*

Certain times are mentioned in *Harrison and Richardson's Practice* for pleading upon a *habeas corpus*; but I take it to be the settled practice, that if defendant lives within twenty miles of *London*, *four days*; if above, *eight days*; and the defendant has no imparlance allowed him upon a *habeas corpus*, although declaration be not delivered the same term the *ha. corp.* is brought ^a. Vide *N. on R. 2 Jac. 2. 1 Wils. 154.*

Within what time defendant is to plead.

No imparlance.

The rest of the proceedings are as in common cases.

If no Bail put in or justified, how to proceed.

If the defendant does not put in or justify his bail in due time, then issue the following writ of *procedendo*:

George the third, &c. To the sheriffs of *London*, *Procedendo*, greeting: Although we lately by our writ commanded you, that you should have the body of *C. D.* detained in our prison under your custody, as it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same, before our right trusty and well-beloved *Lloyd lord Kenyon*, our chief justice, assigned to hold pleas in our court before us, at his chambers in *Serjeants-Inn, Chancery-lane*, immediately after the receipt of that writ, to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet we being now moved with certain causes in our court before us, command you, and every of you, that in all complaints and suits against the said *C. D.* at the suit of *A. B.* in our court before you, or any of you, now depending undetermined, you proceed with what speed you can, in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first thereupon directed to the contrary in anywise notwithstanding. Witness *Lloyd lord Kenyon* at *Westminster*, the 15th day of *June*, in the thirty-sixth year of our reign.
Mansfield and Way.

^a The rule (as to imparlance) does not extend to cases, where the defendant removes the cause from an inferior court. 6 Term Rep. 752. *Smith v. James.*

Præcipe.

London, *Procedendo* for A. B. against C. D.—I R. attorney; pay signing 5s. 8d. with Messrs *Provost* and *Webb*, seal 7d. allowing 6s. 10d. attorney's fee, 3s. 4d. in the court below.

If after *procedendo* to carry back a cause to the inferior court, the plaintiff recover and sue bail on *sci. fa.* and they bring *ha. corp.* to remove the cause, court will order a *procedendo* in the suit against the bail.

In June 1794, plaintiff commenced an action in the *Marshalsea* court against one *Daly*, and held him to bail. In July, a *ha. corp.* was brought to remove the cause here; but for want of justifying bail in *Michaelmas* term a *procedendo* issued.—The present defendants were bail below. In *Hilary* term, cause was tried below; verdict for plaintiff, and costs taxed. Afterwards a *sci. fa.* issued against the above defendants, who appeared, and declaration was delivered; they demurred; and before argument, brought a *ha. corp.* to remove the cause here. The steward of the palace court returned the *sci. fa.* ats. of the plaintiff. Motion why *procedendo* should not be granted.—Court said, that this proceeding by *sci. fa.* was merely an attendant on the original cause; and that as that had been already sent back to the palace court, this ought also to follow it, for that the proceeding against the bail should be carried on in the same court with the principal action. Rule abs. *Dixon v. Heslop* and *Gilpin* bail of *Daly*, 6 *Term Rep.* 365. The rule also was for costs of the application, which was granted.

It is laid down, if a writ be against a *feme sole* in the inferior court, who afterwards marries, and brings a *habeas corpus* to remove the cause, the court will order a *procedendo*; for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. *Salk.* 8. Vide *Barnes* 355. where the court set the plea of coverture aside. *Haddorpe v. Howard*.

Directions to the inferior Courts.

As a *habeas corpus*, and *procedendo*, must be directed properly to the inferior courts, such of them as I have collected, are as follow:

Mayor's court,
London.
Sheriff's court
of ditto.
Marshalsea.

To the mayor, aldermen, and sheriffs of London.

To the sheriffs of the city of London.

To the judges of our palace court of Westminster, and to each of them, greeting.

If in sheriff's
court in any
county.

If it is in the sheriff's court in any county, direct it to the sheriff, as Middlesex, Berks, Oxford, &c.

To

To the steward of our court of record, within the manors of Stepney and Hackney, in the county of Middlesex, hamlets and liberties of the same, and also to the high bailiff of the said liberty, and to either of them.

Stepney.

To the marshal of our prison of the Marshalsea before us.

Marshal.

To the warden of our prison of the Fleet.

Warden of the Fleet.

To the mayor, aldermen, and sheriffs of the city of Bristol, and the mayor and constables, keepers of the staple of the same city, in the court of Colley.

Bristol.

To the mayor, recorder, aldermen, and justices of the city of Bath, in the county of Somerset, and to every of them.

Bath.

To the mayor, aldermen, burgesses, and recorder of the town of Bedford, in the county of Bedford.

Bedford.

To the mayor, aldermen, and burgesses of the town of Beverley, in the county of York.

Beverley.

To the bailiff and burgesses of the town of Buckingham, in the county of Buckingham.

Buckingham.

To the mayor, recorder, and burgesses of the borough of Bury Saint Edmond, in the county of Suffolk.

Bury Saint Edmond.

To the mayor, or recorder, and town clerk of the borough court of Caermarthen.

Caermarthen.

To the mayor and bailiffs of the town of Cambridge.

Cambridge.

To the steward of the liberty of Providence, archbishop of Canterbury, in the court of his palace, within the city of Canterbury.

Canterbury.

To our trusty and well-beloved our chief justice assigned to hold the sessions of pleas within the liberty or royal franchise of the honorable and right reverend father in God by Divine permission, lord bishop of Ely, within the isle of Ely, in the county of Cambridge, and to Thomas Gotobed, Esq. chief bailiff of the said bishop, within the liberty of the said isle, and to each of them, greeting.

Ely.

N. B. A non-omittas or latitat is directed in this way.

To the mayor and bailiffs of our city of Exeter, in the county of Devon, and to the bailiffs, citizens, and profits of the same city.

Exeter.

To the mayor, aldermen, and citizens of the city of Hereford.

Hereford.

To the mayor and capital burgesses of the borough of Hertford, in the county of Hertford, and also to the steward of our court of record there.

Hertford.

To the mayor and sheriffs of our town and county of Kingston upon Hull, in the county of York,

Kingston upon Hull.

- Kingston upon Thames.** *To the bailiffs and steward of our court of our town of Kingston upon Thames; and, in the absence of the said steward, to the bailiffs and recorder of the same town, or any two of them.*
- Lincoln.** *To the mayor, sheriffs, and citizens of the city of Lincoln.*
- Litchfield.** *To the bailiffs, burgeses, and citizens of the city of Litchfield.*
- King's Lynn.** *To the mayor and recorder of our town or borough of King's Lynn, in the county of Norfolk.*
- St. Martin's le Grand.** *To the steward of the dean and chapter of the collegiate church of Saint Peter, Westminster, of the court of their liberty, or precincts of Saint Martin's the Great, in London, and to the constables there.*
- Newbery.** *To the mayor, aldermen, and burgeses of the borough of Newbery, in the county of Berks.*
- Northampton.** *To the mayor and bailiffs of the town and borough of Northampton, in the county of Northampton.*
- Norwich.** *To the mayor, aldermen, and sheriffs of the county of the city of Norwich.*
- Oxford.** *To the mayor and bailiffs of the city of Oxford, in the county of Oxford.*
- Portsmouth.** *To the mayor, aldermen, and burgeses of the town of Portsmouth.*
- Southampton.** *To the mayor and bailiffs of our town of Southampton.*
- Taunton.** *To the bailiff of the reverend father in Christ, by Divine Providence, lord bishop of Winchester, of his liberty of Taunton and Taunton Dean, in the county of Somerset.*
- Thetford.** *To the mayor and recorder of our borough of Thetford, in the county of Norfolk.*
- Wells.** *Wells, borough or city. To the steward or bailiff of our court of our pleas, granted to the reverend father in Christ, lord bishop of Bath and Wells, held at the Guildhall within the city and borough of Wells, in the county of Somerset.*
- Woodstock.** *To the mayor of the town of New Woodstock, in the county of Oxford.*
- Worcester.** *To the mayor, recorder, and aldermen of our city of Worcester, and to every, &c.*
- York.** *To the mayor, aldermen, and sheriffs of the city of York.*
- If improperly directed.** *If the writ be improperly directed to inferior courts, and they make a return, no objection can be made by third persons. Daniel v. Phillips, 4 Term Rep. 499.*

The

The court of *K. B.* will not quash a writ because the damages laid in the record below, which was an action for an assault against excise officers, were under 40s. ; they said the officer could not have an impartial trial there. *Ibid.*

Excise officers.

Ha. Corp. ad satisfaciendum.

This writ is made use by a plaintiff in this court, where his prisoner has removed himself *after declaration to the Fleet prison*, in order to bring him here, to charge him in execution upon a judgment obtained, and it is called an *habeas corpus ad satisfaciendum*, to satisfy or make satisfaction to the plaintiff for the debt and damages by him recovered ; which being obeyed, the court commit him again to the custody of the marshal, there to remain until he make satisfaction, and is made returnable *on a day certain* as the prisoner cannot be committed in execution, but by the court, whilst they are sitting. Also it may be sued out by a third person, who has obtained judgment in this court against the prisoner, directed to the marshal or other gaoler to bring him into court, in order to charge him in execution at his suit in that action ; and although in this case it be left in vacation with the marshal or other gaoler, he cannot discharge such prisoner, but must bring him into court on the day of the return.

Ha. corp. ad satisfaciendum.

Ha. Corp. ad satisfaciend.
in Case.

Ha. Corp. ad satisfaciend.
in Debt.

^a George, &c. To the warden of our prison of the *Fleet*, greeting : We command you, that you have before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained,

George, &c. To the warden of our prison of the *Fleet*, greeting : We command you, that you have before us at *Westminster*, on *Monday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained,

5s. stamp.

Put the term and No. roll on the writ.

^a Marshal of our prison of the *Marshalsea*.

tained, by whatsoever name the said *C. D.* is there known, to satisfy *A. B.* 25*l.* which the said *A. B.* lately in our court before us at *Westminster*, recovered against the said *C.* for his damages which he sustained, as well by reason of the not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster*, in the county of *Middlesex*, as for his costs and charges by him laid out, about his suit, in that behalf, whereof the said *C.* is convicted, as appears to us of record, and further to do and receive what our said court before us, shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the 15th day of *June*, in the 36th year of our reign.

Mansfield and Way.

To be signed by Messrs. *Provost* and *Webb*, and a *præcipe* is made for that purpose; pay them 6*s.* 8*d.*, seal 7*d.*; then it is to be lodged with the warden of the *Fleet*: on the day of the return, he is brought up, apply to one of the judges' clerks, who will make out the commitment; pay the warden his fee for return and bringing-up; tipstaff 10*s.* 6*d.*, judge's clerk 4*s.*, master 2*s.*, deputy-marshal 2*s.*, clerk of the papers 1*s.*, ushers 6*d.*; the judge's clerk takes the *habeas corpus* into court with the defendant, and the master commits him.

Præcipe.
London.

Ha. corp. ad satisfaciendum for *A. B.* against *C. D.* for 25*l.* damages, (for 25*l.* debt and 10*l.* damages and costs,) returnable, &c. *J. K.* attorney.

N. B. The master marks the commitment on the duplicate of the writ prepared for him ready, which is delivered to the tipstaff, who carries the prisoner over to the *King's Bench* prison. Pay master 2*s.*

Paupers.

Definition.

A Pauper is a person said to be, by the law, so poor and indigent in his circumstances, that he cannot

not dispend the usual charges to recover his right, either in *law* or *equity*.

It appears in very early times, viz. 1495, that poor persons having any claim to lands or other right, were frequently obliged to drop the pursuit thereof in a court of *law* or *equity*; the expence being too great for them to bear. This being a great grievance to the subject, and, in order that men should not be stripped of their legal possessions and right, by the Stat. 11 H. 7. c. 12. it is enacted, That every poor person who shall have cause of action, &c. shall have original writs, &c. nothing taking for the same, counsel, attornies, and all other officers requisite and necessary for the speed of the said suits to be had and made, who shall do their duties without any reward. No stamps are to be used, 5 W. & M. c. 21. in the proceedings.

In early times, poor persons were obliged to drop their claim.

Every poor person shall have writs for no fee, counsel and attorney.

The courts have fixed the sum to be under five pounds (*except wearing apparel, and his right to the matter in question*). Lill. Prac. Reg. 633.

Sum to be under 5l.

Therefore, if the plaintiff is so poor as above stated he must petition one of the judges of this court, to be admitted to sue *in forma pauperis*, and if he has begun the suit, and not able to carry on the same, yet he may petition to be admitted; engross it on a 2s. stamp paper, annex also the affidavit thereto on 2s. stamp paper, then take same to the judge's chambers, and after oath is made thereof, the clerk will make out an order thereon, pay him 2s. 6d. The form of the petition and affidavit are as follow; no rule is drawn up in this case:

How to sue.

In the King's Bench.

A. B. plaintiff,
and
C. D. defendant.

To the Right Honorable Lloyd Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench.

The Humble Petition of A. B.

Sheweth,

That the said defendant is and stands justly indebted unto your petitioner in the sum of 10l. for the work and labour of your petitioner, done for the said defendant, at his request, and your petitioner hath commenced an action against him for the same.

If the action be not begun, then say "and your petitioner hath not as yet com-

"menced any
"action against
"him, being
"unable," &c.

That your petitioner finds himself unable to carry on the said cause, on account of his extreme poverty, as appears by the affidavit hereto annexed:

"Your petitioner, therefore,
"most humbly prays your lord-
"ship, that he may be admitted
"in *forma pauperis*, to prosecute
"his said action, and that J. M.
"esq. may be assigned to him as
"his counsel, and J. K. his at-
"torney to prosecute his said
"suit.

I humbly conceive, that
the said petitioner hath
good cause of action
against the above-named
C. D. and humbly ac-
cept to be his counsel.

J. M.

"And your petitioner shall ever
"pray," &c.

King's Bench.

A. B. agt. C. D.

Affidavit.

A. B. of, &c. yeoman, maketh oath and faith, that he is not worth *five pounds* in all the world (save and except the matter in question in this cause, and also his wearing apparel).

To pay no fees.

The pauper, upon the order being made, may sue out his writ without stamps, pay nothing through all the cause for fees to any of the officers; if defendant pleads a special plea, shew petition and order to the clerk of the papers, and he will make up the paper book for nothing; no stamps are used for the record, venire, or distringas, nor for setting down the cause, or return of distringas.

Unless he recovers
5l. or more.

But if he recover a verdict, the officers of the court claim *the fees of court*, and take for the passing the record; but by what authority, I never yet could learn*. The declaration is in the common form; to which you annex a copy of the judge's order, of his being admitted.

No fee to be
paid to counsel
or attorney.

If the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall be dispaupered, and not be admitted again in that suit. He is not liable to pay costs, but be in the discretion of the court, whether he shall be punished or not. *Stat. 23 H. 8. 2 Salk. 506.*

Not liable to
pay costs.

Nor for judg-
ment, as in the
case of a nonsuit.

He is not liable to pay the costs for judgment as in the case of a nonsuit, *3 Wils. 24.*; nor to pay the costs before he brings a new action, if it does appear that he has not been vexatious. *Str. 878.* Nor to

* Mr. Tidd says if he recover 10l., but cites no authority. *Sellon 157.* above 5l.

pay the costs for not going on to trial. *Ibid.* 420. *May be dispaupered, if vexatious.*
Noaks v. Watts. Fortesc. 319. If he has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. 2 *Str.* 983.

The plaintiff (not suing *in forma pauperis*) being nonsuited in a former action against the defendant, brought a second action for the same cause, and sued *in forma pauperis* being a prisoner in the *K. B.* The costs of the former action amounted to 32l. which the defendant swore he could not levy, the plaintiff not having any goods. Rule why the proceedings in the second action should not be staid until the costs of the former were paid, made absolute. *Weston v. Withers*, 2 *Term Rep.* 511. *After nonsuit and a new action brought before payment of the costs.*

A person admitted *in forma pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted again *de novo et sic toties quoties.* *Lil. Reg.* 633. *Can only sue in cause he is admitted.*

Although the stat. of 11 *H.* 7. admits poor persons to prosecute, yet it has not provided for poor defendants to defend, nor does the stat. of 23 *H.* 8. exempt them from paying costs; therefore they cannot petition to defend *in forma pauperis.* *Cannot be admitted to defend.*

A pauper is not entitled to the issue money. 5 *Term Rep.* 509.

Consolidating of Actions.

* If there be two or more actions brought upon the same policy of assurance against the underwriters, or two or more *ejectments* on the demise of the same lessor of the plaintiff for the same premises, and they proceed separate, the defendants may apply to the court by way of motion to consolidate such actions; if in term time, it is a rule to shew cause, pay 8s. 6d. each, if in vacation, by way of summons, before a judge; and upon their undertaking to be bound, and concluded, in all the actions, by the fate of the verdict *How to consolidate.*
 2 *Barnard. K. B.* 103. *contra.*

* If plaintiff will not consent, court have the power of granting *imparlances* in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action. *Parke's Insur.* And he adds, if the plaintiff consents to the rule, court will make defendant submit to admit the policy, produce and give copies of books and papers, and undertake not to file a bill in equity, or bring a writ of error. *Ibid.*

in the action brought against the first defendant, and to bring no writ of error, the court will stay all the proceedings in the last actions until further order; but all the rules must be paid for separate, as also the summonses and orders; and if the verdict turns in favor of plaintiff, *to the satisfaction of the judge who tried the cause*, the plaintiff may proceed to tax his costs on that verdict, and get the defendant's attorney to attend the master, who will tax the costs in the other actions, which if complied with (*as is usual*), and not paid, with the debt, move the court, upon an affidavit of the facts, "*for leave to enter up the judgment, and take out execution thereon, and that the master may tax the costs in all the causes, and for the costs of the application*;" one stamp for the affidavit is sufficient, which the court will order; after the costs are taxed, they are to be paid within a limited time; if not, sign the judgments upon a double half-crown stamp, and take out execution thereon; you pay for separate rules, and counsel's fees are not fixed.

If two actions be brought, which might have been tried.

If two actions are brought by the same plaintiff, for causes which may be joined, and the defendant be holden to bail in both, the court will compel the plaintiff to consolidate them, and pay the costs. *Cecil v. Burgefs*, 2 Term Rep. 639.

37 ejectments on same demise consolidated.

Rule why the proceedings in all the causes (37 in number in ejectment for houses in *Sackville-street*) should not be staid, and abide the event of a special verdict, in *Doe ex demise Pulteney v. Caven*—Lord Kenyon said, it was a scandalous proceeding, they all depended precisely on the same title, and ought all to be tried by the same record. *Rule abs. Doe ex demise Pulteney et al. v. Freeman et al.* Sellen 229.

But where three actions were successively brought on three notes, due at different times, refused.

But where three actions were successively brought by the same plaintiff, against the same defendant, upon three notes of hand, which became due at different times, the court refused to consolidate them. *Messenden v. O'Hara*, M. 25 Geo. 3. Tidd 367. And the court will not consolidate actions against different defendants in trespass, though the affidavit be that the trespass, if any, was committed by all jointly: the court said, they never went so far as the case of different defendants, but only where the declarations are between the same parties. 1 Str. 420. *Bayley v. Raby et al.*

This

This rule may be applied for on the same day *the plea is delivered or filed*; for in that rule will be contained, a stay of the proceedings, which will prevent *all the issues* being made up and delivered. But you must plead before the application.

When rule may be applied for.

Abatement.

The general rule to be observed in this case is, that where the death of any party happens, and yet the plea is in the same condition as if such party were living, there such death makes no alteration or abatement of the writ. 10 *Mod.* 251. *Gil. C. P.* 242. *Vide* title *Reviving Judgments*, and *stat.* 8 & 9 *W.* 3. c. 11. s. 7. respecting the death of one of the plaintiffs or defendants.

When no alteration made by death.

By the *stat.* 17 *Car.* 2. c. 8. it is enacted, that the death of either party between verdict and judgment shall not be alledged for error, so as judgment be entered *within two terms after such verdict*.

Death of either party between verdict and judgment, not error.

If either party *die before the assizes*, it is out of the statute; but if *after the assizes*, though before trial, it is no error; for the assizes is but one day in law. *Salk.* 8. pl. 21. 2 *Ld. Raym.* 1415.

Death before assizes, suit abates; if after the day, not.

If *after verdict*, and *before the day in bank*, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had entered judgment on the roll. *Sid.* 385. But a *sci. fa.* must issue before execution. 1 *Wils.* 302. *Earl v. Brown.*

In ejectment, defendant died between the first day of the assizes and verdict: The court held the judgment well entered. *Robertson v. Moor*, 12 *Mod.* 241. 1 *Sid.* 131.

Ejectment.

An ejectment, against baron and feme, after verdict for the plaintiff, baron dies between the day of *nisi prius* and the day in bank; adjudged that the writ should stand good against the *feme*, because it is in the nature of a trespass, and the feme is charged for her own act; and the action survives against her; so if the wife had died, the baron should have judgment entered against him. *Gro. Jac.* 356. *Gro. Car.* 509. *Roll. Rep.* 14. *Moore* 469.

Ejectment against baron and feme, baron dies between the day of nisi prius and day in bank, it is good against the feme.

If a feme sole plaintiff after verdict, and before the day in bank, takes husband, she shall have judgment,

If feme takes husband after verdict, and before the day in

bank, she shall have judgment, but a *sci. fa.* must be sued.

If pending an argument plaintiff dies, the suit does not abate.

So if defendant dies.

A feme sole cannot by marriage abate her writ.

If she is sued, and takes husband, writ does not abate.

Marriage after suit in an inferior court, pleadable in abatement in superior court after removal.

How to proceed.

If there are two suits pending for the same cause of action, the second suit shall abate.

Suggestion on the declaration of the death of one of the plaintiffs, after writ sued out.
Vide p. 333.

ment, *Cro. Car.* 232. but a *sci. fa.* must be sued out before execution.

If pending an argument on a special verdict, and the court takes time to consider thereon, the plaintiff dies, the judgment will be ordered to be entered up as of the term in which judgment ought to have been signed, 1 *Burr.* 226.; the like may be done if the defendant dies. *Ibid.* 147. 4 *Burr.* 2277.

A feme sole cannot abate her own writ by marriage, for this would be taking advantage of her own act. 2 *Roll. Rep.* 53.

If a feme sole is sued, and after takes husband, it is no abatement; for the plaintiff would be in a fine condition if, after they have arrested a woman, she shall be allowed to overthrow the proceedings by a subsequent marriage. *Ld. Raym.* 1525. 2 *Str.* 811. *King & ux v. Jones.*

But if an action be brought in an inferior court against a feme sole, and pending the suit, she marries, and afterwards removes the cause, and the plaintiff declares against her as a feme sole, she may plead coverture at the time of the *habeas corpus*, because the proceedings here are *de novo*, and the court takes no notice of what was precedent to the *habeas corpus*; but it is said, the course in those cases is to move the matter to the court upon the return of the *habeas corpus*, and the court will grant a *procedendo*; for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. 1 *Salk.* 8. pl. 10. *Sid.* 40. *Cro. Car.* 104.

The law abhors multiplicity of actions: and therefore whenever it appears upon record, that the plaintiff has sued out *two writs* against the defendant for the *same thing*, the *second writ* shall *abate*; but then it must plainly appear to be for the same thing. *Mod.* 418. 539. 5 *Co.* 61.

Suggestion on Record.

London, (ss.) A. B. complains of *C. D.* being, &c. in a plea of trespass on the case, *For that whereas* the said *C. D.* on the 1st day of *November* in the year of our Lord 1795, to wit, at *London*, &c. was indebted to the said *A. B.* and one *C. H.* his partner (which

(which said *C. H.* the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, since the issuing of the writ of *latitat* against the said *C. D.* at the suit of them the said *A. B.* and *C. H.* to wit, on the 28th day of *November* in the year aforesaid, at *London* aforesaid, in, &c. died, and the said *A. B.* survived him, which the said *C. D.* doth not deny), in 20l. of lawful money, &c. for divers goods, wares, and merchandizes, by the said *A. B.* and *C. H.* in his lifetime before that time sold, &c.

Go to the end of the issue; the same day is given to the parties aforesaid at the same place; then say, before which day, to wit, on the day of in the year aforesaid, at *London* aforesaid, in, &c. the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, that the said *C. H.* died, and the said *A. B.* survived him, which the said defendant doth not deny: And the said defendant by his attorney came; but the said sheriff did not send the said writ, nor did he do any thing thereon; therefore, as before, it is commanded to the said sheriff, that he cause to come before our said lord the king, at *Westminster*, on next after twelve, &c. by whom, &c. and who neither, &c.

Suggestion of the death of one of the plaintiffs after issue joined.

To the end of the *postea*. And upon this the said plaintiff says, that after the last continuance of the plea aforesaid, to wit, on the day of in the year aforesaid, at, &c. in the county aforesaid, the said *C.* died, and this is not denied; therefore let all farther proceedings against the said *C.* cease; whereupon the said plaintiff prays judgment against the said *J.* for the damages, costs, and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, to be adjudged to him, &c. therefore it is considered, &c.

Suggestion of the death of one of the defendants after verdict.

Upon a writ of error it appeared, that the death of *Rebecca Savil Far* was suggested in the *jurata* of the record of *nisi prius*, and not in the usual way, and afterwards the death was suggested upon the roll in the usual way. The error assigned was, "*That there is no record of nisi prius, and that judgment is given for the plaintiff below, whereas it ought to have been given for the defendant;*" then a *certiorari* issued, to certify the record of *nisi prius*, which was done, and in *nullo est*

Suggestion of the death of one of the defendants in the *jurata* of the record, when it ought to have been upon the *nisi prius* record, and before the *jurata*, right suggested on the roll, and held good.

erratum

erratum pleaded by defendant in error, the objection taken was, that it ought to have been suggested upon the *nisi prius* record, and that is not sufficient in the *jurata*. Lord *Mansfield*—The suggestion, award, and all the proceedings shew one of the defendants to be dead; and there is an award for the proceedings to stay as to this defendant, and to go on against the other only; and the jury is awarded as against the living one, the other being dead; both were alive when the issue was joined; a day was given to the parties, one defendant is awarded to come, the other not, and the sheriff doth not return the writ, and a *new venire* is awarded to try the issue against the surviving defendant, and it is properly awarded upon the issue roll, and acknowledged. The *nisi prius* roll is only for the direction of the judge, to try it; and it is not traversable on the roll, the judgment is right enough, 1 *Burr.* 363. *Far v. Denn.*

One of 2 plaintiffs died before interlocutory judgment, but suit went on to execution in the names of both; after this, and after motion to set aside the proceedings for the irregularity, court permitted suggestion, and to amend *ca. fa.*
 2 *Laroche v. Walfrough*,
 2 *T. R.* 737.

Jordan, one of the plaintiffs, died in *Dec.* 1793, but in last *Hilary* term interlocutory and final judgment were signed in the name of both plaintiffs. Motion to set aside the interlocutory judgment and subsequent proceedings, and to discharge the defendant out of custody as to the execution in this cause. Pending this rule, *Newnham*, the plaintiff, obtained a cross-rule to shew cause why the death of *Jordan* before the interlocutory judgment should not be suggested on the roll, and why the writ of *ca. fa.* should not be amended^a by striking out *Jordan's* name. Both rules came on together. Lord *Kenyon*—This objection should not have been taken at all; the plaintiff might here have made the suggestion as a matter of course; and he ought now to be permitted to make the amendment. *Per Cur.* Let the first rule be discharged, and the second made absolute, without costs. *Newnham & Jordan v. Law*, 5 *Term Rep.* 577.

Suggestion for Costs on the Court of Conscience Act.

A creditor suing in another court shall pay costs, and recover none.

By 3 *Jac.* 1. c. 15. s. 4. it is provided, That if one citizen of *London* sue another out of the jurisdiction, and does not recover 40s. he shall not only lose his own costs, but shall also pay to the defendant

so

so much ordinary costs, as such defendant shall justly prove it hath cost him in defence of the suit.

By *sect. 2.* the right of suing in this court is only given to "every citizen and freeman, or any other person inhabiting within the city or its liberties, being a *retailer, tradesman, or labouring man;*" against persons of the same description, the 4th *sect.* makes it necessary for defendant to prove that he was an inhabitant and resident of the city, but says nothing *restrictive* of the description of the plaintiff.

Vide 14 Geo. 2. c. 10. l. 4.

If the plaintiff does not recover the sum of 40s. against any the persons described in *stat. 14 Geo. 2. c. 10.* the defendant may, the next term after verdict, apply to the court upon affidavit, stating, "that at the time of the commencement of the suit, the defendant did, and ever since hath, and still doth reside and keep a house in King-street, Cheapside, in the city of London, and liable to be summoned to the court of requests held at the Guildhall of the said city, and the debt for which the action was brought was contracted in the said city, and that the plaintiff, who also resides in the said city, proceeded to trial in the said cause, and obtained a verdict for 32s. and no more;" for a rule to shew cause why the plaintiff should not bring the *posse* into court, and file the plea roll, so that the defendant may enter a suggestion thereon, that the damages recovered in the action do not amount to 40s. and that the defendant, at the time of the commencement of the action, was an inhabitant and resident within the city of London, and liable to be summoned to the court of requests there; and why the plaintiff should not pay to the defendant double costs of suit, pursuant to the statute, and in the mean time further proceedings be staid: pay for rule 11s. counsel 1l. 1s.; serve copy on plaintiff's attorney, and if no cause shewn, make affidavit of the service thereof, and move to make it absolute; counsel one guinea; tax the costs on the rule with the master, on his appointment.

The Westminster, and most of the other acts, must be pleaded.

A captain of a Portuguese ship that lay on board it, and constantly at the Royal Exchange, was held to be a person within the 14 Geo. 2. c. 10. by the court below, and had costs allowed him.

Who is within the act.

After an inquest taken by default, defendant came into court, and suggested upon the roll, that plaintiff ought not to recover, &c. setting out the statute

If judgment goes by default, no suggestion.

X 7

of

of 3 Jac. 1. *Per Cur.*—The inquest being taken by default, the defendant is out of court as to all purposes but having judgment against him; after a default there can be no repleader. *Brampton v. Crabb, Str. 46.*

Costs are to be paid of the application.

Verdict for less than 40s. in *London*, court gave the defendant leave to suggest it on record, which being entered, a demurrer was put into it, and adjudged for the defendant; it came to be a question, whether costs of the application should be allowed, and the court ordered it. *Hickman v. Colley, Str. 1120.*

A citizen and freeman of *London*, not resident therein, having a demand under 40s. for goods sold against another citizen and freeman resident in the city, is not bound to sue in court of requests, act applies only to cases where both are residing.

14 Geo. 2. c. 10.

Verdict for plaintiff at the sittings at *Westminster* for 34s. for goods sold and delivered; motion to enter a suggestion on the roll, that plaintiff and defendant were citizens and freemen of *London*, and defendant resided within the jurisdiction of the court of requests, and answerable thereto, and that the transaction, which was the subject-matter of the action, arose *within the same jurisdiction*. But it appeared by affidavits *that plaintiff did not reside* within the same. *Per Cur.*—It is plain from the words and general scope of the act of Geo. 2. that it was only intended to extend to persons residing within the jurisdiction of the *court of requests*, and that the word *inhabiting* must be taken to apply as well to citizens and freemen, as to every other person there described. If this were otherwise there might be a failure of justice in many cases; and that court could not have enforced payment of costs in the present case, if they had adjudged the plaintiff's demand to be unfounded. *Webb v. Brown, 5 Term Rep. 535. Rule disch.*

The affidavit should state the *residency of plaintiff as well as defendant* in the city, at the time of the commencement of the action, and their occupations.

Use and occupation, though under 40s. cannot be maintained in the court of conscience.

It is held, that an action for use and occupation cannot be maintained in the court of conscience in *London*; and therefore it being brought in the K. B. plaintiff had a verdict for 11. 7s. 6d. Motion for suggestion for costs, parties being resident there, under 3 Jac. 1. c. 15. s. 4.; the court refused the suggestion, and said, that the court of requests could not hold plea for rent, as the title might come in question if brought by a devisee or purchaser. *Woolley v. Cloutman, Dougl. 247.*

The

The *stat. 14 Geo. 2. c. 10.* does not extend to cases where the plaintiff recovers less than 40s. in a special action on the case for the breach of an agreement: it only extends to cases where a *certain sum* is due. *Jones v. Greening*, 5 *Term Rep.* 529. *Sed. qu.* May not judge certify under 43 *El.*?

Nor does it extend to special actions on the breach of agreement.

In *Dougl.* 449. I find affidavit only states, that defendant resided in the county of *Middlesex*, and liable to be summoned. And in p. 245. that defendant was an inhabitant of the city of *London*, and liable to be sued in the court of conscience there, under *stat. 3. Jac. 1. c. 15.* And the reporter adds, that defendant ought to shew that the plaintiff was such a person as is authorized by *sect. 2. to sue in the city court.* Vide *Str.* 1191. Vide *Dougl.* 247.

As to affidavit.

On trial at *Guildhall*, the plaintiff proved 4l. 15s. 3d. due to him, which was discharged by a set-off to 1l. 13s. 3d.; the defendant moved upon 3 *Jac. 1. c. 15.* for a suggestion; but the court held, he was not entitled to the benefit of that act, for it was plain the real demand was above 40s. and how could the plaintiff tell whether the defendant would set off any thing in that action, so as to be bound to choose that jurisdiction? besides, he has in effect recovered 4l. 15s. 3d. because a debt which he must have otherwise paid, is now satisfied. The plaintiff had judgment for the 1l. 13s. 3d. and his costs. *Str.* 1191. *Pitts v. Carpenter*, *S. C.* 1 *Wils.* 20.

A set-off reducing the demand to 40s. does not affect the jurisdiction.

But if the plaintiff's demand be for 15l. 3s. 9d. and reduced to 1l. 13s. 9d. by payments made under the plea of *non assumpsit* to plaintiff (and no advantage taken of the set-off), it was held, that a suggestion upon the act might be entered. *Barnes* 354. *Benson v. Hemming.*

But when payments are given in evidence on the plea of non assumpsit, and verdict under 40s. a suggestion, &c.

If the damages are under 40s. in *assumpsit* against an inhabitant of *Middlesex*, the defendant shall have double costs, whether the plaintiff sues in his own right, or as personal representative, under 23 *Geo. 2. c. 33.* *Dougl.* 247. *Wase adm. v. Wyburd.* But a personal representative cannot be sued in the county court of *Middlesex*, and shall therefore pay costs above, though damages under 40s. *Ibid.* 264. *Alway v. Burrows executor.* Lord *Mansfield* said, the court will not permit the suggestion of a matter on the roll, *unless it appear to be relevant*, and it could not be meant to give

Costs.

Adm.

this court of conscience a jurisdiction over executors. If there is no express exception (in 23 *Geo. 2. c. 33.*) there is one implied from the nature and reason of the thing.

On reference.

Action brought for goods sold, plea general issue, on which issue was joined. A rule of reference was made at the trial. The arbitrator awarded 11. 17s. due to the plaintiff; no set-off was made by the defendant. Motion was made for a suggestion, both parties living within the jurisdiction of a court of conscience, viz. *Southwark*. Cur. said, had a verdict been for the plaintiff under 40s. there must have been a suggestion, so in this case; and the defendant had liberty to enter it. *Butler v. Grubb, Hil. T. 1783.*

Plea of tender.

If there be a plea of tender, and plaintiff have a verdict for 7s. 6d. more, defendant is liable to the costs. *Heaward v. Hopkins, Dougl. 448.*

Discontinuance.

DISCONTINUANCE is an interruption, intermission, or cessation, of the course of a thing, as discontinuance of possession of a plea, process, &c. The effect of discontinuance of process is, that the opportunity of prosecution is lost, and not recoverable but by beginning a new suit.

After demurrer joined and entered, cannot discontinue without motion.

It has been ruled that plaintiff may discontinue upon motion after a special verdict, which is not complete and final, but never after a general verdict, 1 *Salk.* 178.; or after inquiry executed and returned, *Carth.* 86.; or after a peremptory rule for judgment on demurrer. 1 *Salk.* 179.

After verdict.

After issue and a verdict, cannot discontinue without consent of defendant; for if plaintiff will not enter up judgment, defendant may. *Salk.* 178. After demurrer argued and allowed, it may be discontinued on payment of costs. *Str.* 76. 116. 3 *Lev.* 440.

But before or after declaration he may, by side-bar rule.

The plaintiff may, if he sees occasion, discontinue before or after declaration delivered, by a motion at the side-bar, on payment of costs; *N. on R. Mich.* 10 *Geo. 2.*; which is done, by getting a rule for that purpose, at clerk of the rules; pay 4s. get appointment thereon to tax the costs from the master, then make copy and serve it on defendant's attorney; if he does not attend, the matter does not wait till the third appoint-

Must now attend the first appointment.

appointment, but will tax on the first if plaintiff wishes it; they must be paid forthwith, *as the rule is conditional*, and has no effect until payment is made^a. But in *replevin* the avowant cannot have a rule. *Str.* 112. *Long v. Buckeridge*. *Vide* title *Executors and Administrators*, p. 403.

If the rule is obtained by unfair practice it will be discharged. 4 *Burr.* 2502.

Feigned Issue.

THIS is generally directed either by the court of *Chancery* or *Exchequer*, where in a suit a matter of fact is strongly controverted, these courts being so sensible of the *deficiency* of trial by written *depositions*, that they will not bind the parties by their decree, but direct the matter to be tried by a jury; especially such important facts as the validity of a will, or whether *A.* is heir at law to *B.* or the existence of a *modus decimandi*, or real and memorable composition for tithes; therefore as no jury can be summoned to attend the *Chancery*, or *Exchequer* on the equity side; the fact is usually sent to be tried by the court of *Chancery* to the *King's Bench*; and the court of *Exchequer* to the law side of their own court, upon a feigned issue; wherein the plaintiff declares, that he laid a wager of 5*l.* with the defendant, that *A.* was heir at law to *B.*; and then avers that he is so; and brings this action for the 5*l.* The defendant allows the wager, but avers that *A.* is not the heir to *B.*; and thereupon the issue is joined.

Generally directed by the courts of equity.

N. B. These courts direct the fact to be tried by the decree, and who are to be plaintiff and defendant, and also that the attorney for the defendant shall forthwith appear and plead. A writ is taken out in the common way, and all the proceedings are as in common cases, except that there is no imparlance allowed, the decree ordering him to plead forthwith.

These courts direct who are to be plaintiff and defendant.

By this mode the dispute is to be determined, which saves all the formality of pleading, and a great expence to the parties.

^a It is held that the rule, does not of itself discontinue, an appointment must be taken out to tax the costs; for some costs must be due, and the costs must be paid. *Whitmore v. Williams*, 6 *Term Rep.* 765.

Costs.

When a feigned issue is directed by a court of law, the costs follow the verdict: but when an issue is directed by the court of *Chancery*, then this court gives no costs. *Herbert v. Williamson*, 1 *Wils.* 324. 1 *Wil.* 261. Vide *Hoskins v. Lord Berkeley*, 4 *Term Rep.* 402. where two issues were directed, plaintiff succeeded on the first issue, and the defendant on the second issue; defendant obtained a rule why the master should not tax his costs on the second issue. The court thought themselves bound at first by the authority of *Herbert v. Williamson*; but strongly intimated an opinion, that as feigned issues were only granted by leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent that the costs should be in the discretion of the court. But it afterwards appearing in this case, that these issues had been tried without consent of the court, they ordered all the proceedings to be staid, adding, that such a proceeding was a contempt of the court.

Court of Chancery refer to the K. B. or C. P. on the words of a will, by way of case.

But if a question of mere law arises in the course of a cause, as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder, or an executory devise; it is the practice of the court of *Chancery*, to refer it to the court of *King's Bench* or *Common Pleas*, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. But the *Exchequer* direct the issue to be tried on the plea side of their own court.

How to proceed.

To proceed therefore in this matter, a case is settled by counsel on both sides, and signed; then move for a *concilium*, the same as on a special cause; set down the case with Mr. *Austin*, and deliver each judge a copy of the case as settled, two days before argument.

Declaration on feigned issue, to try the validity of a will.

Middlesex, (ss.) *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea*, &c. For that whereas, on the day of in the year of our Lord 1796, to wit, at in the said county, a certain discourse was moved and had by and between the said *A. B.* the now plaintiff, of the one part, and *C. D.* of the other part, of and concern-

ing a certain freehold messuage, with the appurtenances,
 situate at _____ in the county of _____
 late the estate of one *F. B.* deceased, and of which
 freehold estate the said *F. B.* deceased, before, and on
 the _____ day of _____ in the year 1792,
 was seised in his demesne, as of fee, and afterwards
 died seised thereof, and also of and concerning a cer-
 tain paper-writing dated the said _____ day of _____
 in the said year 1792, purporting in
 itself to be the last will and testament of the said *F. B.*
 deceased: And whether the said *F. B.* deceased, did by
 the said paper-writing, so purporting as aforesaid,
 devise the said freehold estate (amongst other things) or
 not, to the said *A. B.* the now plaintiff; and upon that
 discourse the said *A. B.* the now plaintiff, then and
 there asserted and affirmed, the said *F. B.* deceased, did
 by the said paper-writing, dated the said _____ day
 of _____ in the year 1792, devise the said free-
 hold estate to him; which said assertion and affirmation
 of the said *A. B.* the now plaintiff. he the said *C. D.*
 then and there wholly denied, and then and there al-
 leged the contrary thereof; and thereupon afterwards,
 to wit, on the said _____ day of _____ in
 the year 1796 aforesaid, at _____ aforesaid,
 in the county aforesaid, the said *A. B.* the now plain-
 tiff, at the special instance and request of the said *C. D.*
 undertook, and then and there promised the said *C. D.*
 to pay him the sum of 5*l.* in case the said *F. B.* deceased,
 did not by the said paper-writing, dated the
 day of _____ in the year 1792, devise the said
 freehold estate (amongst other things) to him as aforesaid;
 and in consideration thereof, he the said *C. D.*
 then and there undertook and faithfully promised, the
 said *A. B.* the now plaintiff, to pay him the sum of 5*l.*
 in case the said *F. B.* deceased, did by the said paper-
 writing, dated the _____ day of _____ in
 the year 1792, devise the said freehold estate (amongst
 other things) to the said *A. B.* the now plaintiff, as
 aforesaid: and the said *A. B.* the now plaintiff, avers,
 that the said *F. B.* deceased, did by the said paper-
 writing, dated the _____ day of _____ in
 the year 1792, devise the said freehold estate (amongst
 other things) to him as aforesaid, to wit, at _____
 aforesaid, in the county aforesaid, whereof the
 said *C. D.* afterwards, to wit, on the said _____

day of _____ in the year 1796 aforesaid, at
aforesaid had notice, by means whereof
he the said *C. D.* according to the tenor of his promise
and undertaking as aforesaid, became liable to pay,
and ought to have paid, the said sum of 5*l.* to the said
A. B. the now plaintiff, to wit, at _____ aforesaid,
in the county aforesaid; yet the said *C. D.* not
regarding his said promise and undertaking so by him
made in this behalf as aforesaid, but contriving, and
fraudulently intending, craftily and subtilly to deceive
and defraud the said *A. B.* the now plaintiff, in this
behalf, hath not yet paid the sum of 5*l.* or any part
thereof, to the said *A. B.* the now plaintiff (although so
to do, he the said *C. D.* was requested, by the said
A. B. the now plaintiff, afterwards, to wit, on the said
day of _____ in the year 1796
aforesaid, and often afterwards, to wit, at _____

afore said, in the county aforesaid); but he to
 pay the same, or any part thereof, to the said *A. B.*
 the now plaintiff, hath hitherto wholly refused, and
 still refuses, to the said *A. B.* the now plaintiff, his da-
 mage of 20*l.* and therefore he brings his suit, &c.
 And the said *C. D.* by *J. G.* his attorney, comes
 and defends the wrong and injury, when, &c. and says,
 that true it is, that such discourse was moved and had,
 by and between the said *A. B.* the now plaintiff, and
 the said *C. D.* as is above mentioned in the said decla-
 ration, and that he the said *C. D.* did undertake and
 promise, in manner and form as the said *A. B.* the
 now plaintiff, hath above thereof complained against
 him: But the said *C. D.* saith, that the said *A. B.* the
 now plaintiff, ought not to have his afore said action
 thereof maintained against him; because he says, that
 the said *F. B.* deceased, did not by the said paper-
 writing, dated the day of in
 the year 1792, devise the said freehold estate (amongst
 other things) to him the said *A. B.* the now plaintiff as
 afore said, and of this he puts himself upon the coun-
 try: And the said *A. B.* doth the like. Therefore,
 &c.

Issue directed by the court of *Chancery*, which defendant was desirous of trying, but which (it was suggested) the plaintiff wished to delay, and on that ground, *motion that defendant might be at liberty to carry the record down to trial at the next assizes*, observing that

Court will permit defendant to carry a record of an issue directed down to trial, on a sug-

Breach.

Plea.

that by the common law the defendant could not carry it down *by proviso*: Court thought the application reasonable, and granted rule absolute in the first instance; saying, that the plaintiff would not be damaged by it, for that if he chose to take the record down himself, the costs of this application must be paid by the defendant. *Rule abs. Humpage v. Rowley, 4 Term Rep. 767.*

gestion that plaintiff intends to delay it.

Popular Actions.

Compounding them.

BY stat. 18 Eliz. c. 5. *sect. 3.* "No informer shall compound or agree with persons that shall offend against any penal statute for an offence committed; but *after answer* made in court unto the information or suit: Nor after answer, but by order of that court: That if any person shall offend, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at *Westminster*, and be convicted, shall stand on the pillory, &c. and be disabled to be plaintiff or informer in any suit upon any statute, popular or penal: And forfeit ten pounds, &c." *Sect. 4.*

No informer shall compound with defendant but by the consent of the court.

This act not to restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit, is or shall be specially limited or granted, by virtue of any statute, and not generally to any person that will sue. *Sect. 6.*

Penalties given to persons certain, not generally.

It seems clear, both from the preamble and the whole tenor of the statute, that it extends only to suits by common informers, and not to those by a party grieved. 2 *Haw. 279.*

It extends only to suits by common informers.

In an action for making and selling gold rings, of less fineness than statute directs, moved for leave to compound without consent. *Per Cur.*—It is in the discretion of the court to give leave to compound; and afterwards they refused the motion. *Howell, qui tam, v. Morris, B. R. 1 Wils. 79.*

Leave to compound denied upon the statute,

Poole moved for leave to compound on the part of the prosecutor upon the statute of gaming, upon an affidavit

Leave given to compound on

the statute of gaming.

affidavit that the defendant and one *A. B.* used to play at cards together, and that the defendant had won divers sums of *A. B.*; that *A. B.* was become a bankrupt, and that the assignees, who set this prosecution on foot, were satisfied with respect to the defendant; and the court granted the motion. *Ibid.* 130.

Poverty.

On an affidavit of the defendant's poverty, the court will give leave to the prosecutor *qui tam* to compound, though in execution. *Str.* 167. *Bradshaw v. Mottram.*

If in a penal action a rule be obtained to stay the proceedings on the sum agreed on; an attachment may be moved for the non-payment of that sum.

Rule last term was obtained to stay proceedings in an action on penalties under the lottery act, on payment of 20*l.*; for the non-payment of which, an attachment was now moved for.—Lord *Kenyon* said, the court would not grant a rule to stay the proceedings in a penal action, on paying the sum agreed upon, but upon a supposition, that the defendant undertook by his application to pay that sum. *Rule abs. Rex, qui tam, v. Clifton, 5 Term Rep. 258. E. 33 Geo. 3.*

After verdict, granted.

The court gave leave to compound in an action for usury *after verdict*, favorable circumstances appearing, which would have justified a motion for a new trial. *Maughan, qui tam, v. Walker, 5 Term Rep. 98.*

Defendant now to undertake to pay sum.

Ordered, that in future every rule to be drawn up for compounding any *qui tam* action do express therein, that the defendant doth thereby undertake to pay the sum, for which the court hath given him leave to compound such action. *R. E. 33 Geo. 3.*

How to proceed. Affidavit.

This motion is made upon the affidavit of one of the parties, stating, that an action is brought upon such an act of parliament, and that the declaration contains penalties to the amount of 150*l.* that since the said defendant has pleaded *nil debet*, and that the plaintiff and defendant have agreed to compound the same for the sum of 50*l.* and that no more is given or taken, nor is it compounded in any other way than by leave of the court.

Give this affidavit to counsel, likewise the plaintiff must give a brief upon a slip of paper to consent to the motion on payment of the sum of 50*l.* agreed, his fee half-a-guinea.

To whom the money is to be paid.

The court made a rule, that where they give leave to compound a penal action, the king's half of the composition shall be paid into the hands of the master of the

the *Crown-office*, for the use of his majesty, and it is now paid before the rule drawn up. *Brown, qui tam, v. Bailey, 4 Burr. 1929.* The receipt of the master of the *Crown-office* is taken to the clerk of the rules, before he will draw up the rule.

Arbitration.

ARBITRATION, or arbitrage, is where the parties, Definition. injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbiters or arbitrators, who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar*), to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called *an award*: and thereby the question is as fully determined, and the right transferred or settled as it could have been by the agreement of the parties, or the judgment of a court of justice. Experience has shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult, and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as those where no action is brought, and which still depend upon the rules of the common law; enacting by *stat. 9 & 10 W. 3. c. 15.* “That all
“merchants and others, desiring to end any contro-
“versy (for which there is no other remedy but by
“personal action or suit in equity), may agree, that
“their submission to arbitration or umpirage of any
“person, &c. shall be made a rule of any of his ma-
“jesty’s courts of record; which agreement, &c.
“shall, upon producing an affidavit made by the wit-
“nesses thereunto, or any of them in court, be en-
“tered and filed of record of the said court, and a
“rule shall thereupon be made by the same court,
“that the parties shall submit to, and finally be con-
“cluded by the arbitration or umpirage, &c. and in
“case of disobedience, the party neglecting shall be
“subject to all the penalties of contemning a rule of
“court;”

Merchants, &c., desiring to end controversies by arbitration, may agree their submission to the award of any person, be made a rule of court.

In case of disobedience, party neglecting subject to attachment, unless, &c.

" court ; unless such award shall be set aside for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court before the last day of the next term after the award is made."

And in consequence of this statute it is now become a considerable part of the business of the superior courts to set aside such awards when *partially* or *illegally* made ; or to *enforce their execution*, when *legal*, by the same process of contempt as is awarded for disobedience to those rules and orders which are issued by the courts themselves. But in a case where the parties attempted to set aside an award, Lord Hardwicke said, *that the only ground to impeach an award is, collusion, or gross misbehavior of the arbitrators, or otherwise it is final and binding upon all parties, otherwise no persons would ever undertake to be arbitrators.* 3 Atk. 529. Lord Mansfield in another case said, *that the court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators.* 2 Burr. 701. *Lucas v. Wilson.* Nothing but manifest corruption in the arbitrators, is good ground within the *stat. 9 & 10 W. 3.* to set aside an award. We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. *Str.* 301. *Anderson v. Coxeter.*

The ground to impeach.

How to make the application.

The mode of setting aside an award is by application to the court, founded on some objection to its legality, appearing on the face of the award itself, or on an irregularity, as want of notice of the meeting, 1 Salk. 71. ; or gross misbehavior of the arbitrators ; affidavit of which must be made ; and on such application every ground of relief in equity against it, is equally open in this court, 3 Burr. 1258. ; or the objections to the award may be shewn for cause against an attachment.

Awards considered with greater latitude and less strictness than formerly.

Awards are now considered with *greater latitude* and *less strictness* than they were *formerly*. And it is right that they should be liberally construed ; because they are made by judges of the parties *own choosing*. They must have *two properties*, to be *certain* and *final*. But the *certainity* may be judged of according to a *common intent*, and *consistent* with *fair and probable presumption*. 1 Burr. 277. *Hawkins v. Calclough.*

An

An arbitrator may award *costs* without any express authority for that purpose. *Roe v. Doe*, 2 Term Rep. 644.

The motion to set aside an award on an *obligation*, must be made *before the last day of the next term after such award is published*; otherwise it is too late, and an attachment for the non-performance of it may issue. *Cowp. Rep.* 23. *Freme v. Pinneger*. Str. 301. But this does not relate to an award made in pursuance of an order of *nisi prius*. Str. 301.^a

When motion ought to be made.

How to proceed to make Submission a Rule of Court..

If an award is made, and the party will not perform it, such as not paying the money, &c. at the time and place therein mentioned, and you have attended for that purpose ready to receive it; first proceed to make the submission to the bond a rule of court, upon an affidavit of due execution of the bond, thus:

If an award is made, then to proceed by making the submission a rule of court.

C. G. of, &c. maketh oath and faith, That he was present at the time of signing and sealing the bond or obligation hereunto annexed; and *C. D.* of, &c. therein mentioned, did duly sign, seal, and as his act and deed deliver the said bond, in the presence of this deponent, and that the name *C. D.* set and subscribed to the said bond, is of the proper hand-writing of the said *C. D.* and that the name *C. G.* set and subscribed as the witness thereto, is of the proper hand-writing of this deponent^b.

Affidavit of the due execution of the bond.

If a subscribing witness refuse to make the affidavit, court will, on motion, compel him. *Clark v. Elwick*, 1 Str. 1.

Subscribing witness to bond.

This affidavit is to be engrossed on a 2s. stamp paper; give it to counsel "to move to make the submission a rule of court," pay him 10s. 6d., draw up the rule with the clerk of the rules, pay 2s. per sheet, make copy thereof, and of the award, with the names of the arbitrators and witnesses, then the person who is to receive the money must demand same, which not

How to proceed to get an attachment.

^a What is a consent or submission. Vide Barnes 54, 55. 2 Str. 1178. 1 Salk. 72. 1 Ld. Raym. 674.

^b If no action be depending, the affidavits for attachment need not be intitled in any cause, but the affidavits in answer must. *Brown v. Bevan*, 3 Term Rep. 601. If there is a cause depending, it must then be intitled, if not, court cannot take notice of it, though the adverse party is willing to waive the objection. 2 Term Rep. 613. *Owen v. Hurd*,

being

being complied with, make the following affidavit to move for an attachment, and also an affidavit of the due execution of the award; which see after.

In the *K. B.*

Affidavit of the demand and refusal.

The place mentioned in the award.

A. B. of *Fleet street, London*, grocer, maketh oath and faith, That he this deponent did, on the 4th day of *June last*, personally attend from the hour of one, until the hour of two of the clock in the afternoon of the same day, at *in Fleet-street, London*, and then and there demanded of the above-named *C. D.* who also attended, the sum of 50*l.* awarded due to this deponent, pursuant and agreeable to a certain award in writing, which is hereunto annexed; but the said *C. D.* did not then pay to this deponent the said sum of 50*l.* or any part thereof: And this deponent further faith, That having, on *Thursday* next after one month from *Easter* day, in this present *Easter* term, caused the submission of this deponent, and the said *C. D.* to the said award, contained in a certain bond or obligation, bearing date the 2d day of *April* 1796, to be made a rule or order of this honorable court, he this deponent, on the day of last, served the said *C. D.* with a true copy of the said award and rule or order of this honorable court, and at the same time shewed him the said original award rule or order: And this deponent further faith, That he did at the same time, demand of him the said *C. D.* the said sum of 50*l.* so awarded due to this deponent as aforesaid; but the said *C. D.* did not then, or at any time since, pay the same, or any part thereof, to this deponent, and the whole of the said sum of 50*l.* now remains due and owing to this deponent, on the said award.

Positive affidavit as to demand.

There must be a positive affidavit of *personal notice of award and demand of the money all at one time* on motion for an attachment, because it brings the party into contempt. 12 *Mod.* 257. *Anon.*

If party absconds.

If an award be made a rule of court, and the party who refuses to obey the award absconds, so that he cannot be found on a week day, service thereof on a *Sunday* is sufficient to bring him into contempt, whereon to have an attachment. *Ibid.* 158.

Administrator.

A submission to arbitration by an administrator, is not of itself an admission of assets. *Pearson v. Henry adm.* 5 *Term Rep.* 6. This was on a bond of arbitration.

tion. I should advise an executor or administrator to have a rule of reference.

Give affidavit to counsel, "*to move for an attachment for not paying the money on the award in pursuance of the rule of court*;" fee 10s. 6d. it is a rule to shew cause, pay 2s. per sheet; draw it up at clerk of the rules, and serve copy thereof; make affidavit of the service, give counsel one guinea to make it absolute, which being done, draw up rule, pay 2s. per sheet; take it to the *Crown-office* to your clerk in court, who will make out an attachment, fee 13s. 4d. get a warrant thereon, and give it to an officer, pay him one guinea for the caption ^a.

How to move for the attachment.

How to proceed on a Rule of Reference.

After commencement of the action, the parties by consent may have the cause referred without carrying it to trial, which saves great expence, and is done by the signature of counsel on each side, the one moves, and the other consents, fee 10. 6d. each, draw up rule as hereafter.

If there be a rule of reference at *nisi prius*, it is best for the attornies to get their witnesses sworn in court whilst they are there, pay 2s. each, enter their names on a piece of paper, and the cause, give it to the crier for that purpose.

Get order of *nisi prius* from Mr. Lowten, King's Bench Walks, Temple, or, if at the assizes, of the judge's associate, upon which the arbitrator will appoint a time and place for both parties to meet; and plaintiff's attorney serves a copy of the order of *nisi prius* on defendant's attorney; give arbitrator (if an attorney or counsel) the briefs that were delivered, if not, a copy of the case on each side, and names of the witnesses.

Of enlarging the Time.

If the arbitrator does not finish in time, you may enlarge the order by consent (but first the clerk of the rules will make plaintiff's attorney move, that the order of *nisi prius* may be made a rule of the court); which being done, give brief to counsel, with 10s. 6d. each, who will sign their hands to same; carry

If arbitrator does not make his award in time, may be enlarged.

^a It is discretionary in the court, whether they will enforce the award by attachment. 1 Str. 695. 1 Comp. 270. 2 Str. 1152. ; as if the party became bankrupt and obtained his certificate.

them

them to the clerk of the rules, and he will draw up rule for the enlargement, pay 6s. the plaintiff's attorney serves copy on defendant's attorney, and an appointment must again be made by the arbitrator, and service thereof made as before. It cannot be enlarged *without consent* on both sides.

Award.

When the award is made, the arbitrator's attorney gives notice to the attorneys, that the same is ready, and that each may have his part on such a day, on payment of his expences.

If umpire receive the evidence from the arbitrators without examining the witnesses (unless required so to do) before his award, court will not set it aside.

An umpire having heard the evidence from the two arbitrators, on which he made his award, without re-examining the witnesses *after he had made the award*, he was applied to by the party against whom it was made, to hear the evidence himself, and on his refusal, the court was moved to set the award aside. But the court thought, that as no application was made *before he had made his award* to examine the witnesses, the rule should be discharged with costs. *Hall v. Lawrence*, 4 Term Rep. 589.

Quaker no witness to ground an attachment for non-performance of award.

Per Curiam.—We cannot ground an attachment for non-performance of an award on the affirmation of a Quaker; for though it be in a suit between party and party, yet it is a criminal prosecution within the proviso of the statute 7 & 8 W. 3. c. 34.

How to proceed after such Award executed.

If the award is in favor of the plaintiff or defendant, costs are of course given as to the suit by the rule; therefore get an appointment from the master at the foot of the rule of court, to tax the costs; serve copy with appointment on the opposite attorney, and, on attendance, the master will tax the costs, and mark them on the rule; and if the party against whom the award is, does not pay the money, *make a copy of the rule of court, and the master's allocatur thereon, as also a copy of the award*, and let your client the plaintiff first examine copies thereof; then let him deliver the copies to the defendant; shewing the *original order and award*, and at the same time demand the money, *viz.* the sum awarded, and the costs; if he does not pay them, move on the following affidavit for an attachment.

N. B.

N. B. A letter of attorney may be made for this purpose; but it is too expensive, as there must be an affidavit of the due execution, and the attendance.

A. B. of, &c. the plaintiff in this cause, maketh oath and faith, That he this deponent, on the day of _____ last, personally served the above defendant with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the original rule, *allocatur*, and award, and demanded of him the said defendant, the payment of the sum of 20*l.* awarded, due to this deponent by *W. G.* of, &c. the arbitrator, named in the said award, and also the payment of the sum of 14*l.* for the costs mentioned and allowed to him the said plaintiff in the said cause; but the said defendant refused to pay the same, or any part thereof, and the whole of the said 20*l.* and 14*l.* still remain due and owing from him the said defendant, to this deponent.

Affidavit of service of rule, and *allocatur* for costs and the demand of the money.

W. T. of, &c. gentleman, maketh oath and faith, That he did see *W. G.* of, &c. sign, seal, publish, and declare his final award and arbitrement between *A. B.* of, &c. merchant, and *C. D.* of, &c. woollen-draper, bearing date the _____ day of _____

Affidavit of due execution of the award to be made by one of the witnesses.

1796. And this deponent further faith, That the name *W. G.* set and subscribed against the seal as the party executing the said award, is of the proper hand-writing of the said *W. G.* and that the names *W. T.* and *J. E.* set and subscribed thereto as witnesses, attesting the execution of the said award, are of the respective hand-writing of this deponent and the said *J. E.* If party cannot be found to demand the money, on affidavit of the facts, court will make a rule to shew cause, why leaving copies of award, rule, and master's *allocatur* at his house, and demanding the money of his wife, should not be good service.

It is settled that an attachment for non-performance of an award is only in the nature of a civil execution, and therefore no arrest can be made on a *Sunday*; also that the prisoner under such an attachment may take the benefit of the lords' act. *The King v. Miners*, 1 *Term Rep.* 266. *Vide Casp. Rep.* 136.

Cannot arrest on an attachment on a *Sunday*.

* In this case, affidavits to be intitled in the cause depending. 2 *Term Rep.* 613.

When there is a Verdict and Bail.

When bail is taken, and a verdict subject to reference, how to proceed.

2 Vin. 33.

Frequently where there is bail, and a reference is proposed at the trial, the plaintiff, *to prevent the bail being discharged, takes the verdict*, subject to the reference; in that case, when the award is made, if in favor of the plaintiff, he may make his election whether he will proceed or not under the rule of reference, or on the *verdict*: If he proceeds in the latter, the costs must first be taxed; copy rule and award, serve same and demand the sum awarded, and costs, in the same manner as if he *meant* to proceed under the rule; and on affidavit of personal service of the rule, the master's *allocatur* thereon, a copy of the award, and demand of the money, move the court that *the poslea may be delivered to the plaintiff, and that he may be at liberty to sign judgment, and take out execution for the money awarded and costs, and that the master may tax the costs of the application*; which being done, draw up the rule as usual with the clerk of the rules, make affidavit of the service, and if the court make the rule absolute, draw up same, and apply to the marshal for the *poslea*, who (on producing the rule) will deliver it (*a rule for judgment should be given previous to the motion*); then sign judgment with the master (first stamping the *poslea*); get the master to tax the costs, and then take out execution, but levy only for the sum awarded and costs.

If the award be for a less sum than the verdict, the plaintiff may levy the equitable costs out of the excess. *Per Master Benton*. It is in the election of the plaintiff which way he will proceed, either on the verdict, or by attachment, *Hall v. Mifer*, 1 Salk. 84.; if he proceeds by attachment, affidavit is necessary of the personal service of the rule of court, master's *allocatur* thereon, copy of award, and personal demand of the money awarded, with an affidavit of the due execution of the award, and such affidavit must be intitled in the cause.

Proceedings against Justices and Constables.

May plead general issue, and if a verdict if judge certify, &c. double costs.

By stat. 7 Jac. 1. c. 5. If any action shall be brought against any justice of the peace, constable, &c. for any thing done by virtue or reason of his office, he may plead

plead the general issue, and give the special matter in evidence, and if such justice, &c. shall have a verdict, he shall have double costs allowed. So if the plaintiff be nonsuit, or discontinue. *N. B.* The judge must certify that he was acting in the execution of his office. *Grindley v. Holloway, Dougl. 307.*

But if there be a special verdict, and it appears that the act done was so done by virtue or reason of his office, the master may tax double costs, though no certificate. *Rann v. Pickins, Ibid. 308. in notes.*

No writ shall be sued against, nor copy of process served, on any justice of the peace, for any thing done in the execution of his office, until notice in writing of such intended writ, &c. shall have been delivered to him, or left at his usual place of abode, or served at least one calendar month before the suing out or serving the same; in which notice shall be contained "the cause of action which the party suing claims to have against such justice of the peace;" on the back of which notice shall be indorsed the name and place of abode of the plaintiff's attorney or agent, who shall be entitled to 20s. for preparation and service of such notice. *Stat. 24 Geo. 2. c. 44. s. 1.*

In every case of service of a notice, leaving it at the dwelling-house of the party has always been sufficient. *4 Term Rep. 465. Ld. Kenyon.*

That it shall be lawful for such justice of the peace, at any time "within one calendar month after such notice given," to tender amends to the party complaining, or to his agent or attorney; and if not accepted, to plead such tender in bar, together with not guilty, and any other plea with leave of the court; and if on issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or discontinue, or in case judgment shall be given for such defendant on demurrer, such justice shall be entitled to the like costs as he would have been entitled to, in case he had pleaded the general issue only; and if the jury find no amends tendered, or not sufficient, and also against the defendant on such other plea or pleas, then they shall give a verdict for the plaintiff, and damages, which he shall recover, with costs. *s. 2. Vide Buller N. P.*

24.

Y y 2

If

If special verdict,

No writ to be sued against any justice for what he shall do in the execution of his office, till notice given him.

Leaving at dwelling-house will do.

That he may, within one calendar month, tender amends,

If tender sufficient, verdict for defendant.

Double costs.

If the justice gains a verdict, double costs. 7 Jac. 1.

6. 5.

Plaintiff not to recover without proof of such notice.

That no such plaintiff shall recover any verdict against such justice, in any case where the action shall be grounded on any act of the defendant, as justice of the peace, unless it is proved upon the trial of such action, that *such notice was given as aforesaid*; but in default thereof, such justice shall recover a verdict and costs. *f. 3.*

If justice neglect to tender, he may pay money into court.

That in case such justice shall neglect to tender amends, or tendered insufficient amends before action brought, he may, before issued joined, pay into court such sum of money as he shall see fit. *f. 4.* But it must appear, that the action is brought against him as a justice in the execution of his office. Vide 2 Black. Rep. 859. Annex the copy of notice to affidavit.

Evidence not to be given of any cause, but such as is contained in the notice.

That no evidence shall be given on the trial of any such action, of any cause of action (*except such as is contained in the notice hereby directed to be given*). *f. 5.*

Actions against Constables.

Action not to be brought against any constable, &c. acting in obedience to justice's warrant, till demand made of the copy of the warrant, and refusal thereof, &c.

That no action shall be brought against any constable, or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant of any justice, until demand made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected, for the space of six days after such demand; and in case after such demand and compliance, by shewing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c. for any such cause, without making the justices defendants, that on producing and proving such warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding

* The privileges under the above acts only extend to cases where the justices, &c. are acting in execution of their office. Vide 1 Str. 446. 3 Burr. 1742. And the acts only extend to cases of torts, not to actions of another nature brought against officers. Bull. 24.

such defect of jurisdiction; and if the verdict shall be given against the justice, that in such case the plaintiff shall recover costs, to be taxed, so as to include such costs as such plaintiff is liable to pay to such defendant or defendants, for whom such verdict shall be found. *f. 6.*

Where the plaintiff shall obtain a verdict, in case the judge shall in *open court* certify on the back of the record, that the injury was wilfully and maliciously committed, he shall be entitled to *double costs*. *f. 7.*

Where the judge shall certify the injury was wilfully committed, plaintiff to recover double costs. Limitation of actions.

No action shall be brought against any *justice* for any thing done in the execution of his office, or against any *constable*, *head-borough*, or other *officer*, or *person acting as aforesaid*, unless commenced "*within six calendar months after the act committed*." *f. 8. a*

The form of the notice against the justice pursuant to the statute.

I hereby give you notice, in pursuance of the statute in such case made and provided, that I shall, at or soon after the expiration of one calendar month from the service of this notice, sue out of his majesty's court of *King's Bench*, a bill of *Middlesex* against you at my suit, and shall proceed against you thereon; for that you, on the day of in the year of our Lord 1796, at *T.* in the said county, with force and arms, &c. made an assault upon me, and beat, bruised, wounded, and ill-treated me, and then and there imprisoned me, and caused and procured me to be kept and detained in prison, for a long space of time, (to wit) the space of three weeks then next following; whereby I was, during all that time, prevented from following my lawful business, and was necessarily put to a large expence, (to wit) an expence of 80*l.* in and about my support during such imprisonment, and in and about the procuring of my discharge therefrom, and for other wrongs done to me by you. Dated, &c. 1796.

Here set forth the cause of action accurately.

D. M. of, &c.

To A. B. Esquire, one of his Majesty's Justices of the Peace in and for the County of Middlesex. }

Indorse on the back of the writ the christian as well as the surname of the plaintiff's attorney, and place of abode; and say, attornies for the within-named *D. M.*

^a The action must be brought in the county where fact committed. 21 Jac. 1. c. 12. f. 5. Vids p. 229. So against constables.

Indorse it on the back, thus:

W. C. attorney for the said *D. M.* N^o 5, *Middle-Temple-lane, London.*

Mr. J. W.

Notice to the
constable to de-
mand a copy of
the warrant,

Whereas, on or about the 28th day of *September* 1796, you entered into and upon the dwelling-house of *D. M.* of, &c. and then and there made distress of, took, seized, and carried away an oval mahogany tea-table, the property of the said *D. M.* under colour and pretence of some warrant or warrants of some justice or justices of the peace, empowering you so to do: now, in pursuance of an act of parliament passed in the 24th year of the reign of his late majesty king *George* the second, for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants; I do hereby, on the behalf of, and as attorney for the said *D. M.* demand the perusal and copy of all and every warrant and warrants, under and by virtue of which you entered, seized, and made distress of and carried away the said oval mahogany tea-table as aforesaid. Dated this day of

1796.

To *Mr. J. W.* of, &c.

W. C. attorney for the said
D. M. of N^o 2, *Inner-Temple-lane, London.*

Proceedings against Officers of Excise, &c.

From Aug. 1,
1783, officers
not to be sued
for any thing
done in the ex-
ecution of their
office until after
a month's no-
tice.

Particulars to
be contained in
such notice,

By *stat. 23 Geo. 3. c. 70. s. 30.* it is enacted, That after the 1st day of *August* 1783, no writ shall be sued out against, nor a copy of any process served upon, any officer or officers of excise, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of his or their office, until "one calendar month next after notice in writing shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue out such writ or process as aforesaid; in which notice shall be clearly and explicitly contained, "the cause of action, the name and place of abode of the person

"person who is to bring such action, and the name
"and place of abode of the attorney or agent," and a
fee of 20s. be paid for preparing and serving such
notice.

That it shall be lawful for any of the said officers,
&c. to whom such notice shall be given, at any time
within one calendar month after such notice shall have
been given, to tender amends to the party complaining,
or to his or her agent or attorney, and if not accepted,
to plead such tender in bar, with not guilty, and any
other plea; and if, upon issue joined, the jury find the
amends tendered sufficient, then they shall give a ver-
dict for the defendant; and in case the plaintiff shall
become nonsuited, or discontinue, or in case judg-
ment shall be given for such defendant, on demurrer,
then such defendant shall be entitled to the like costs as
he would have been entitled to, in case he had pleaded
the general issue only; and if, upon issue so joined,
the jury shall find no amends tendered, or not suffi-
cient, and also against the defendant in such other
pleas, then they shall give a verdict for the plaintiff,
and damages, with costs. *f. 31.*

Officers may
tender amends.

If amends ten-
dered be suffi-
cient, a verdict
to be given for
the defendant,
who shall be en-
titled to costs,
&c.

If a revenue officer seize goods as forfeited which
are not liable to seizure, and take money of the owner
to release them, the latter may recover back the
money in an action for money had and received. In
such an action, a month's notice need not be given
under the 23 Geo. 3. c. 70. *f. 30.*

On an action for
money had and
received.

It turned out these goods were not seizable; if they
had, plaintiff could not have recovered.

In an action of *trespass or tort*, the officers are en-
titled to notice, because they are to have an opportu-
nity of tendering amends: but the act does not extend
to an *assumpsit*. *Irwing v. Wilson, 4 Term Rep. 487.*

That no plaintiff, in any case where an action shall
be grounded on any act done by the defendant, shall
be permitted to produce any evidence of the cause of
such action, *except such as shall be contained in the notice*
to be given as aforesaid, or shall recover any verdict
against such officer, or persons acting in his aid, un-
less he shall prove on the trial of such action, *that*
such notice was given, and that in default of such proof,
the defendant shall recover a verdict and costs. *f. 32.*

No evidence of
the cause of ac-
tion to be pro-
duced, except
what is contain-
ed in the notice.

That in case such officer, &c. shall neglect to tender
amends, or tendered insufficient amends, before the
action

Defendant may
pay money into
court.

PROCEEDINGS AGAINST OFFICERS OF EXCISE, &c.

action brought, it shall be lawful for him, before issue joined, to pay into court, such sum of money as he shall see fit. *f. 33.*

Limitation of actions.

That if any action shall be brought against any person for any matter done by any officer of excise, &c. in execution of their office, such action shall be brought *within three months next after the cause of action shall arise, and not afterwards*, and shall be laid and tried in the county and place where the facts were committed^a, and not in any other county or place; and the defendant may plead the general issue, and give the special matter in evidence; and if the plaintiff shall be nonsuited, or discontinue; or if, upon a verdict or demurrer, judgment shall be given against the plaintiff; the defendant shall recover *treble costs. f. 34.*

^a 4 Term Rep. 490.
General issue.

Treble costs.

All the regulations in the recited act touching actions to be brought against excise officers and others, extend to officers of the customs, &c.

By stat. 24 Geo. 3. c. 70. it is enacted, That all and every clause, matter, and regulation contained in stat. 23 Geo. 3. c. 70. touching and concerning any action to be brought against any officer or officers of the excise, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of his or their office, or any proceeding thereupon, shall be extended to all actions to be brought against any officer or officers of the customs, or against any person or persons acting by his or their order, and in his or their aid, for any thing done in the execution of, or by reason of their office, and to all proceedings in every such action, in-as full and ample manner as if the officers of the customs had been named and included in the said act. *f. 35.*

Limitation of actions.

That such action is to be brought *within three months next after the matter or thing done; and shall be laid in the proper county*; and the defendant may plead the general issue, and give this act and the special matter in evidence; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuited, or discontinue, or judgment shall be given against him, upon demurrer, then defendant shall have treble costs. *f. 39.*

General issue.

Treble costs.

Notice to be given.

You having on the 12th of *March* instant, as an officer of his majesty's excise and customs, seized, taken, and carried away a large quantity of snuff, to wit, one hundred pounds weight of rappee snuff, the property of B. C. of, &c. tobacconist: I do therefore

fore (according to the statute in such case lately made Place of abode. and provided), as attorney for the said *B. C.* hereby give you notice, that I shall at, or soon after, the end of *one calendar month* from your being served with this notice, sue out of his majesty's court of *King's Bench* at *Westminster*, a certain writ of our lord the king, called a *latitat*, against you for the said trespass; and shall proceed thereon to judgment according to the rules and practice of the said court. Dated this day of 1796.

To Mr. *S. C.* and *A. H.*

Yours, &c.

An excise officer is entitled to notice for an act not warranted by his official capacity, if done *bonâ fide* in the supposed execution of his duty; such as the assaulting of an innocent person, whom he suspects to be a smuggler employed in running goods. In this case, an affray had just taken place with some smugglers, when the plaintiff passed by under circumstances of suspicion, and refused to stand search. *Daniel v. Wilson*, 5 Term Rep. 1. When he is entitled to notice.

Notices of Motion.

In many cases I have observed that no notice is necessary where there is to be a rule to shew cause in strictness; yet in some cases, in order to stay proceedings, it may be necessary; therefore I shall give precedents of different notices^a.

You having been served with a copy of a *latitat*, at the suit of the above-named plaintiffs *W. C.* and *R. W.* on the day of last, to appear the 7th day of *November* next, by your attorney, in his majesty's court of *King's Bench*, and the said writ not being returnable; I do hereby give you notice not to appear thereto, there being a mistake in the said writ. Dated this first day of *November* 1796. Notice not to appear to a writ where there is mistake in it,

Yours, &c.

Take notice, that this honorable court will be moved to-morrow, or so soon after as counsel can be heard, that the interlocutory judgment signed in this To set aside an interlocutory judgment.

^a An affidavit cannot be properly sworn before the attorney of the party who produces it; but upon a rule *nisi* the court will enlarge it, until it can be resworn. *Anon. Trin. Term 32 Geo. 2. Lane* for the objection; *Beardrose* against it.

cause

cause may be set aside for irregularity, with costs to be taxed by the master, and in the mean time all proceedings be staid. Dated, &c.

To set aside the judgment and inquiry.

Take notice, that this honorable court, &c. that the interlocutory judgment signed in this cause, and the writ of inquiry executed thereon, may be set aside for irregularity, with costs to be taxed by the master, and in the mean time all proceedings be staid, &c.

To set aside the judgment and execution executed, and that the money paid, &c. be restored.

Take notice, that this honorable court, &c. that the judgment signed in this cause, and the execution issued and executed thereon, may be set aside for irregularity, with costs to be taxed by the master, and that the sum of 50*l.* levied and paid into the hands of the sheriff of *Middlesex*, may be restored to the above-named defendant, and the said sheriff retain the same in his hands, until the further order of this court, and in the mean time all further proceedings be staid. Dated, &c.

To file common bail.

Take notice, that this honorable court, &c. for a rule to shew cause why the defendant should not be permitted to file common bail in this cause, and in the mean time all proceedings be staid. Dated, &c.

To set aside all proceedings for irregularity.

Take notice, that this honorable court, &c. to shew cause, why all the proceedings in this cause should not be set aside for irregularity, and in the mean time all further proceedings be staid. Dated, &c.

To shew cause why it should not be referred to the master, to compute principal and interest upon bond.

Take notice, that this honorable court, &c. for a rule to shew cause why it should not be referred to the master to compute the principal and interest due upon the bond in question, and why, upon payment thereof, together with the costs to be taxed by him, the said bond should not be delivered up to the defendant to be cancelled. Dated, &c.

To shew cause why judgment should not be set aside, and plaintiff answer the matters of the affidavit.

Take notice, that this honorable court, &c. for a rule to shew cause why the judgment signed in this cause should not be set aside for irregularity with costs, and why the plaintiff should not answer the matters of the affidavit, and in the mean time all proceedings be staid. Dated, &c.

To shew cause why the bail-bond and the proceedings thereon, should not be set aside,

That this honorable court, &c. why the bail-bond assigned in this cause, and the proceedings thereon, should not be set aside with costs to be taxed by the master, and in the mean time all proceedings be staid.

Take

Take notice, that this honorable court, &c. why the writ of *latitat* issued in this cause should not be quashed, and why the plaintiff should not pay the costs of this application, and that the plaintiff may answer the several matters mentioned in the affidavit.

Why the writ should not be quashed, and answer the matters.

Take notice, that this honorable court, &c. why the judgment in this cause, and the execution executed thereon, should not be set aside for irregularity; and why the money paid into your hands should not be restored to the defendant, and that in the mean time you retain the same until the further order of this court.

To the sheriff to retain money.

Error.

THE principal method of redress for erroneous judgments in the king's courts of record, is by writ of *error* to some superior court of appeal: and lies for some matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attain, or a new trial, to correct the mistakes of the former verdict.

A redress for erroneous judgments is by writ of error.

It appears that after verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or misspellings; and justice was perpetually entangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties; and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated.

Formerly brought for trivial mistakes.

A writ of error lies from the inferior courts (of a judgment given in a county palatine, *Dy.* 321.; cinque ports; *Wales* in a real action, by stat. 28 *H.* 8. c. 3.; in ejectment, *Mod.* 248.; against a peer attainted before the lord high steward, 1 *Lev.* 149.; on a judgment at the sessions of Old Bailey, by commission, 2 *Leon.* 107.; or of a judgment upon the plea roll in Chancery, *Dy.* 315.) into this court, and not into the *Common Pleas*. So it lies in this court, of a judgment in the *Common Pleas*. 1 *Roll.* 744. 4 *Inst.* 22. From proceedings in this court, in debt, detinue, covenant,

Error lies from inferior courts, &c. in this court.

From this court error lies in the

Exchequer-chamber.

= Lloyd v. Skutt, Dougl. 350.

If proceedings are by original, error lies in the House of Lords.

Exchequer.

Scire facias.

From whence the writ issues.

Who may have this writ.

What writ is to describe.

Privy:

tenant, account, case, trespass, or ejectment, originally begun therein by bill; and also on an action *quod tam*, it lies to the court of Exchequer-chamber, before the justices of the Common Pleas, and Barons of the Exchequer; and from thence also to the House of Lords, Stat. 27 Eliz. c. 28. But where the proceedings in this court do not first commence therein by bill, but by original writ sued out of Chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the House of Lords, the *dernier resort* for the ultimate decision of every civil action, 1 Sand. 346. 1 Sid. 424.; and upon hearing the matter of law, in which the error is assigned, reverse or affirm the judgment.

From the proceedings on the law side of the Exchequer, a writ of error lies into the court of Exchequer-chamber, and from thence to the House of Peers. But no judgment given by either are final, save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit and conform their own.

It does not lie in the Exchequer-chamber on an award of execution on a *scire facias* only, but the writ must also include the judgment in the former action. Andr. 287. Nor in a *scire facias* against bail. 2 Cro. 171. 384. Cro. Car. 300.

The writ of error issues out of the court of Chancery, to authorize the judges to affirm or reverse the judgment given: and all parties against whom judgment is given, ought regularly to join. 3 Mod. 134. Carth. 7. If judgment be against two, and one brings error, it is bad, even though the other is dead, if it does not appear on record: but if it does, then the survivor may bring error. Str. 233. If against three executors, though they plead separately, all three must join. 1 Wils. 88. 2 Str. 977. But if one makes default, he may be severed, Mod. Caf. 40.; and court will give time, Str. 783. If two join in error, and one will not assign, the court will give the other time to summon and sever. Ibid. 783. The writ must describe the suit by the names of all the parties. Str. 682. And a party may have error, though he was not an original party; as tenant by voucher, or resciept. 1 Roll. 747. So by him who is privy, as by the heir. F. N. B. 21. 2 Cro. 160. By an executor or administrator.

nistrator. *F. N. B.* 21. So by a privy in estate ; as by him in reversion or remainder, after a term for life or years, when determined. 1 *Roll.* 748. *Dy.* 16. Tenant in remainder may bring error against a common recovery, where tenant in tail, vouchee, died before the judgment. 1 *Burr.* 410. But it must be by such privy as has benefit by the reversal, 1 *Roll.* 747. Bail shall not have error of a judgment against the principal, though joined with him. 1 *Lev.* 137. *Gro. Car.* 408. 575. It cannot be taken out in the name of the casual ejector. 2 *Burr.* 756. *George v. Wisdom.*

Error ought to be sued against all the parties to the recovery. So against any who was party, or privy to the judgment; and if any who was, has now nothing, yet he shall be named a defendant in error. *F. N. B.* 18.

Against whom it shall be sued.

Motion why the execution founded on a judgment of nonsuit should not be set aside, being sued out after plaintiff had served an allowance of a writ of error; *Bos v. Bennett* in *C. P.* was relied on. *Cur.*—In general a writ of error allowed operates as a *supersedeas* to an execution, and court will stay proceedings of course; but that is on a supposition that the party may have some error to complain of in the judgment. And therefore, if it appear plainly and unequivocally to the court, that the writ of error is brought merely for delay, that reason does not hold. Nothing can make it appear more plainly than the mere state of the proceedings in this case; the case from *C. P.* being directly in point, there seems no ground here from withholding from the defendants the fruits of their judgment. *Buller J.* Here it is apparent that there can be no error of which the plaintiff can avail himself; for if the record were manifestly erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favor. *Rule disch. Kempland v. Macauley & an.* 4 *Term Rep.* 436.

The court will not set aside a defendant's execution for the costs of a nonsuit after notice of allowance of error, because error can only be for delay.

Of quashing Error.

It seems a writ of error may be quashed being brought by one defendant only, of a judgment against two, and laid to the damage of one. *Brewer v. Turner,* 1 *Str.* 233. 8 *Mod.* 305. 5 *Mod.* 338. *Salk.* 319. 2 *Str.* 1110. by this court; and costs are given, *Str.* 606. 8 *Mod.*

1 Will. 83. S. P.

8 *Mod.* 305. It is said a writ of error cannot be quashed till the transcript is returned and filed. *Ld. Ray.* 329.

But will not
quash it if
brought on a qui
tam action re-
turnable in Exch.

But where a writ of error was brought on the stat. of usury, returnable in the *Exchequer-chamber*; the court held, that this application ought to be made to the court of *Chancery*, or to the *Exchequer-chamber*, where it is returnable. *Lloyd qui tam v. Skutt, Dougl.* 352. And there it is said on application to the *Chancery*, that court refused to entertain the question, but the court of *Exchequer* held that the writ of error lies to that court.

If error is sued
out against good
faith.

If an attorney desires time, and says he will not bring a writ of error, notwithstanding which he does, it will be quashed on motion; the court considering it as sued out against good faith. *Cates v. West, 4 Term Rep.* 183. If it bears teste before judgment, it is good. *Vent.* 258.

Of Amendment.

By stat. 5 *Geo.* 1. c. 13. all writs of error wherein there shall be any variance from the *original record*, or other defect, may and shall be amended and made agreeable to such record, by the respective courts, where such writ or writs of error shall be made returnable.

It seems no costs are to be paid on any amendment. *Fitzgib.* 201.

A fault in the writ of error was amended without costs. 2 *Str.* 863. So by striking out a plaintiff. *Ibid.* 892. The court may, when cause in the paper, amend *ex officio.* *Ibid.* 902. *Ld. Ray.* 1587. *Barnard.* 462.

Action against
two, one found
not guilty, the
other guilty:
error brought in
names of both,
court ordered
writ to be a-
mended.

In an action against two, one found not guilty, the other had a verdict against him; the latter brought error in the name of both. Motion to quash it, motion at same time to amend by striking out the name of defendant found not guilty, both rules came on together, and court ordered the amendment, and discharged the rule to quash. *Verelst, Esq. & an. v. Rafail, Cowp. Rep.* 423.

Judgment shall
not be said, on
error for variance
in for & between
original and de-
claration.

By 18 *El.* c. 14. after verdict, no verdict shall be said or reversed for want of a warrant of attorney, nor for variance or form in any writ, original or judicial, or want of writ original or judicial; but this extends not to indictments. Nor, by 21 *Jac.* 1. c. 13. after verdict, &c. for variance between the original writ

writ or bill, and the declaration, plaint or demand, in form only; except appeals or indictments; nor for want of an *averment* of the *parties life*, so as it be proved he or they be in life, or awarding any *venire, habeas corpora*, or *distringas* to a wrong office upon any insufficient suggestion: or that the *visne* was misawarded, so as some place is rightly named; or for misnaming any of the jurors in surname or addition: or for want of any return to any of the writs, so as a panel is returned and annexed, or that the officer's name is not set to the return; or by reason that the plaintiff in *ejectione firmæ*, or in any personal action, be *under age*, appeared by attorney, and the verdict passed for him; but this does not extend to actions on penal statutes, felony, &c.

Nor between original and bill.

Hab. corp. ven. distr. &c.

17 Car. 2. c. 8. enacts, That in all *actions real, personal, or mixt*, the death of either party between verdict and judgment shall not be alledged for error; nor for lack of form or other matters, not against the right of the suit, or whereby the issue or trial is altered.

Death of either party between verdict and judgment.

By 4 Ann. c. 16. all the stat. of *jeofails* shall extend to judgments on confession, *nihil dicit, non sum informatus*, &c. so as there be an original writ, or bill, and warrants of attorney duly filed. 2 Mod. 285.

By 5 Geo. 1. c. 13. After verdict, judgment shall not be staid or reversed upon a writ of error, for any defect in form or substance, in any bill, writ, original or judicial, or any variance in such writs, from the declaration, or other proceedings. s. 1.

After verdict no judgment to be staid for any defect in form or substance, in any bill, &c. or for variance, &c. Within what time to be brought. If error be brought purely for delay.

Such writ of error to be brought and prosecuted with effect within twenty years. 10 & 11 W. 3. c. 14.

If the parties confess that the writ of error is brought purely for delay, the court will interfere, and will not permit them to abuse the forms of justice. Therefore, pending error, an action was brought and rule obtained to stay the proceedings; on shewing cause it appeared that the defendant and his attorney had declared that they would delay the plaintiff as much as possible by bringing error, if he did not comply with the terms proposed. Rule disch. Pool v. Charnock, 3 Term Rep. 79.

But where in a like motion it was shewn by plaintiff's attorney, that he offered to waive the judgment if the attorney for the defendant would point out any error, which was refused; Lord Kenyon said, that the rule must be absolute. If it were fit, that parties should be restrained from

If parties are to be restrained from bringing error, then legislature must interfere.

from bringing writs of error, the legislature must interfere. But by the constitution of this country, every subject has a right to have his cause reviewed by a court of error. In this case perhaps the defendant's attorney might not know whether there was error or not. *Christie v. Richardson*, 3 Term Rep. 79.

The same point was ruled in *Evans v. Gilbert*, Trin. 31 Geo. 3. on a declaration by one of the bail, that the writ of error was brought for delay, *S. P. Barber v. Bolt*, T. 32 Geo. 3. on the attorney's having said so.

Declaration by attorney.

The court will not stay the proceedings pending error on a judgment of nonsuit, without some declaration of the party, &c. that it was brought for delay.

In debt, on the recognizance, pending error, proceedings refused to be staid.

The defendant's attorney had told the plaintiff, "that he must delay the payment of the debt and costs, as long as he could, as his client was already considerably in arrear to him." The court refused to stay the proceedings on the judgment pending the writ of error. *Law v. Smith*, Mich. 30 Geo. 3. Motion why proceedings should not be staid pending error on a judgment of nonsuit. *Box v. Bennett* and *Kempland v. Macauley* were relied on, on shewing cause. *Per Curiam*.—The practice not to stay proceedings pending a writ of error must be confined to those cases where the party himself, his attorney, or bail, declare that the writ of error is brought only for delay. *Rule abs. Levett v. Perry*, 5 Term Rep. 669.

Judgment in debt on a recognizance of bail, defendant sued out a writ of error, plaintiff proceeded. *Rule why proceedings should not be staid, pending error*. It appeared in the affidavit, that defendant's attorney had said, that the reason why he had brought the writ of error was, that if Grant, the defendant, should pay the money pending the action, he should never get it again from Phillips (the defendant in the original action), but that while the cause was depending, he might prevail on him to settle it. *Per Cur.*—It is admitted, that when the party has declared that he brought the writ of error for delay, the court has refused to stay the proceedings. Now the expressions used in this case are equivalent to such a declaration. *Rule disch. Masterman v. Grant*, 5 Term Rep. 714.

Of Bail in Error.

In what cases bail is to be given in error, or execution may issue.

If error be brought *after verdict*, he that brings it must find substantial bail, according to the statute of 3 Jac. 1. c. 8. which enacts, That no execution shall be staid by any writ of error, to be sued for the reversing

verſing of any judgment given in any action or bill of debt, upon any ſingle bond for debt, or upon any obligation, with condition for payment of money only, or upon any action or bill of debt for rent, or upon any contract ſued in any court of record at Weſtminſter, &c. unleſs ſuch perſon, with two ſufficient ſureties, ſhall firſt be bound unto the party for whom ſuch judgment is given, by recognizance to be acknowledged in the ſame court, in double the ſum adjudged to be recovered by the ſaid former judgment, to proſecute the ſaid writ of error with effect; and alſo to ſatisfy and pay (if the ſaid judgment be affirmed) all and ſingular the debts, damages, and coſts adjudged upon the former judgment: and all coſts and damages to be alſo awarded upon the delaying of execution.

By the nature of this recognizance the bail cannot render to priſon the plaintiff in error in diſcharge of themſelves, though he become a bankrupt, nor are they entitled to relief. 1 Term Rep. 624. *Southcote v. Braithwaite*.

No execution ſhall be ſtaid in any of the courts of Weſtminſter, &c. upon any writ of error, after verdict and judgment in any action of debt on the ſtatute 2 Ed. 6. for not ſetting forth of tithes; nor in any action upon the caſe upon any promiſe of payment of money, actions for trover, covenant, detinue, and treſpaſs, unleſs ſuch recognizance ſhall be firſt acknowledged. 13 Car. 2. ſ. 9.

Sec. 11. provides, That it ſhall not extend to actions popular, or on penal ſtatutes, indictments, &c. other than the ſtatute of Ed. 6.

By 16 & 17 Car. 2. c. 8. ſ. 3. "No execution ſhall be ſtaid after verdict and judgment in any perſonal action whatſoever, unleſs a recognizance be entered into according to the 3 Jac. 1. c. 8."

This does not extend to any writ of error to be brought by any executor, &c. nor to any action popular or penal (except debt for tithes). Sec. 5.

That in writs of error on any judgment after verdict, in dower, or *ejectione firmæ*, no execution ſhall be ſtaid, unleſs the plaintiff ſhall be bound in ſuch reaſonable ſum as the court ſhall think fit; with condition, that if judgment ſhall be affirmed, or the writ be diſcontinued, in default of the plaintiff therein; or that

Z z

the.

the said plaintiff be nonsuit, that then the plaintiff shall pay such costs, damages, and sums of money, as shall be awarded after such judgment affirmed, discontinuance or nonsuit had. Sect. 3.

Two years value.

A recognizance in error in ejectment ought to be in the value of two years' rent due. *Vide 4 Burr. 2501. Barnes 103. and double costs. Ibid.*

Two sureties, if he please.

The defendant may give two sufficient sureties if he please in ejectment.

Executors, where the judgment is *de bonis propriis*, must put in bail.

If judgment be against an executor or administrator *de bonis propriis*, and he brings error, he must put in bail, and pay costs on affirmance; but if judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs. *1 Lev. 245. 1 Sid. 368.*

In error on judgment in debt on bond, bail bound in the sum recovered, it being double the sum due.

On a judgment in debt on a bond in the penalty of 1470l. it was moved to justify bail, each in 1470l.; on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for. But *per curiam*—The sum recovered is double the debt really due: and it is sufficient for the bail to justify in 1470l. *1 Wils. 213. Moor v. Lynch.*

Bonds that require bail.

There must be bail on a *bottomry bond*, *Str. 476.*; on a *second writ of error*, *ibid. 527.*; also on a bond given for the payment of 500l. being the sum mentioned in certain indentures, *ibid. 959.*; on bond for 300l. mentioned in a surrender of a copyhold, by way of mortgage, wherein judgment had passed by default, *Barnes 78.*; upon a bond conditioned to pay so much as I shall appoint, *1 Lev. 117.* A bond given by A. to B. to pay a sum certain (the debt of C.) by instalments, the last whereof is still future, is an obligation for payment of money only, and within the stat. *2 Burr. 746. Chauvet v. Alfray.*

Bonds that require no bail.

But not on a bond for the performance of covenants, *Barnes 72.*; nor if conditioned to pay for so much beer as should be delivered to S. not exceeding 100l. after judgment upon demurrer, *Str. 1190. 1 Wils. 19.*; nor upon a bond for performance of an award, or on an obligation to indemnify; agreed by counsel on both sides. *Com. Rep. 322.*

Bond for another's debt.

Error on a bond, conditioned that W. G. was bound with the defendant, for his debt, by bond of the same date, to pay 51l. 10s. to Lat. Ridley, 30th

October, in discharge of the recited obligation; it was held that bail ought to be given. *Comyn's Rep.* 321. *Huddy & Ux. v. Gifford.*

Bail shall be given in an action of debt on the judgment against the principal, notwithstanding a writ of error, *if no bail in the original action*, otherwise not. *Com. Rep.* 556.

Bail shall be given in debt upon the judgment, though a writ of error is brought.

But bail is *not* requisite on bringing a writ of error on judgment in an action of debt, founded on a prior judgment. 3 *Burr.* 1545. *Biddleston v. Whytel.* Nor on judgment in an action of debt upon a recognizance of error. *Ibid.* 1565. It does not appear this was determined.

When not requisite.

The condition of a bond was to convey an estate, on which *oyer* was craved, but defendant suffered judgment to go by default; on a question whether there should be bail on the writ of error, the court held, that the question was properly examinable *by affidavit*, and that plaintiff ought to make it appear that the bond was within 3 *Jac.* 1. and on affidavit of the defendant that the bond was conditioned to convey the estate; court held that bail was not requisite. *Bennett v. Aylett*, *Trin.* 32 *Geo.* 3.

If bond be conditioned to convey an estate, and judgment by default, no bail in error.

How to sue out a Writ of Error upon a Judgment in the King's Bench, by Bill, returnable in the Exchequer-chamber.

^a Make a *præcipe* for the curfitor as follows: *Mid-*
dlesex, writ of error for C. D. at the suit of A. B. on
a judgment in case (on verdict, or on inquiry, as the case
is, to the damage of the said A. B. of 100l.) given
in the King's Bench by bill, returnable, &c.

Præcipe.

J. K. attorney.

Take this to the curfitor of the county in which the *venue* is laid (whose office is the corner of *Curfitor-street, Chancery-lane*), he will make out same by private seal or otherwise; pay, without private seal, 1l. 3s.; 8s. 6d. more if a private seal; when sealed, take it to Mr. Parry's office, *Tanfield-court, Temple*, who will make out allowance on a piece of paper, pay for same 2l. make a copy, serve it on the attorney for the plain-

Where to take the præcipe, and how to get error allowed.

^a The writ of error must be made returnable *after* judgment given, or not amendable. 2 *Sir.* 807. 1 *Term Rep.* 279. *Jacques v. Nixen.*

Allowance a
superfedeas from
the time.

When writs of
error returnable
in Exchequer
shall be delivered
to the clerk of
the errors.

Bail to be put in
within four days.

When it is a
superfedeas.

Bill to be put in
within four days
after final
judgment signed,
without refer-
ence to the time
of allowance, or
serving copy.

tiff in the original action, and at the same time *shew him the original*, and from that time it is a *superfedeas* of all proceedings in the original action, provided it be regularly followed up.

All writs of error, returnable before the justices of the common bench and the barons of the *Exchequer-chamber*, shall without delay be delivered to the clerk of the errors for the time being: and that no person shall be bound to forbear suing out execution, on pretence of any such writ of error, before the writ shall be delivered to the clerk of the errors. *R. E. 36 Car. 2.*

Within what Time Bail to be put in.

In cases where special bail is required, unless the plaintiff upon such writ of error shall, *within four days after the delivery thereof to the clerk of the errors*, put in bail according to law, the defendant may proceed to execution, notwithstanding such writ. *R. E. 36 Car. 2. Vide E. 16 Car. 2.*

Judgment signed 30th April, plaintiff sued out a *fi. fa.* 3d of May, a writ of error was allowed and served on the agent, and on the under-sheriff the 5th of May; the sheriff entered the same day, but after the service of the allowance: No bail in error was put in. Rule why *fi. fa.* executed, should not be set aside for irregularity, discharged. *Afoburst J.* If the writ of error had been followed up immediately by the plaintiff in error regularly putting in bail, it would have operated as a *superfedeas*, but no bail having been put in, the writ of error became a nullity, therefore no foundation for the application. *Lane v. Bacchar, 2 Term Rep. 45.*

On 25th May a verdict was given for the plaintiff; a writ of error was allowed on the 31st. The same day a copy of allowance was served; final judgment was not signed till the 14th of June, and execution issued same day; within four days after which, bail was put in. The question was, if the allowance and service was a *superfedeas*? and on motion to set aside the execution, *Buller J.* said, As to the practice which has been obtained in suing out a writ of error before judgment signed, it happens in almost all cases that the writ is sued out before judgment is actually signed; because otherwise execution would issue instantly: and the court have gone so far, that if a writ of error is sued out,

out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set it aside. The allowance of a writ of error, in the general course of practice, is not served till final judgment is actually signed; and the words of the rule apply to that. The rule requires bail to be put in *within four days after the allowance*; but there is no opportunity of putting in bail before judgment is signed. As to the defendant being too soon in serving the copy of the allowance, it makes no difference, for it only operates as an allowance from the time of signing judgment. The service of the allowance, is only material to bring the party into contempt, if he proceeds to sue out execution afterwards; for the allowance of the writ of error is of itself a *superfedeas*. Rule absolute. 1 Term Rep. 279. *Jacques v. Nixon*.

Service of allowance is to bring party in contempt.

Motion to set aside a *fi. fa.* for irregularity, the judgment was signed on the *Monday*, and the execution taken out the *Friday* following, error was brought, and the question was, how many days the defendant had to put in bail on the writ? Court said, he had *four clear days*, and plaintiff was not entitled to sue out execution till the *Saturday*. Rule absolute. *Bennett v. Nicholls*, 4 Term Rep. 121.

Four clear days after judgment to put in bail.

Although an allowance of a writ of error be a *superfedeas*, yet no contempt is incurred by taking out execution, till after allowance served. *Barnes* 376.

But it is said, if execution be after writ of error allowed, without notice of it, yet restitution shall be granted. 3 Lev. 312. 1 Salk. 321, 322.

A writ of error being allowed (and bail given, when bail is required) it shall be a *superfedeas* of any subsequent execution. 1 Salk. 321. It is a *superfedeas* if allowed, though sued out before judgment. *Moorfoot v. Chivers*, Str. 631. And no contempt is incurred by taking out execution till after notice.

Superfedeas.

If the execution is executed before error allowed, or notice, there shall be no restitution. 1 Salk. 321.

How to put in Bail.

Take the names of the bail and additions, on a piece of plain paper, to the clerk of the errors, who will enter them in his book; appoint him to meet you at the judge's house or chambers for the purpose; bring

How to put in bail.

bring the bail, and then he will take the recognizance; pay him at chambers 1l. 5s. 6d. at *Westminster* 3s. 4d. more; notice must be given to plaintiff's attorney of their being put in, pursuant to *R. M. 5 W. & M.*

In Error.

C. D. against A. B.

Notice of bail.

Take notice, that special bail was this day put in upon the writ of error brought in this cause, with the clerk of the errors, before the honorable Mr. Justice *Grise*, at his chambers in *Serjeants-Inn, Chancery-lane, London*, and their names are *J. K. of, &c. chymist*, and *G. H. of, &c. baker*. Dated, &c. Yours, &c.

Cannot be taken before a commissioner.

G. H. attorney for plaintiff in error.

To Mr. *A. K.* attorney for the defendant.

Four clear days.

The plaintiff has *four clear days* to put in bail in error after signing of the judgment. It seems court will not grant time to perfect bail in error, unless real error can be suggested. *2 Wilf. 114.*

Of excepting to the Bail.

How exception to be entered.

If the bail are not approved of, the defendant in error may have a rule for better bail, which is obtained at the clerk of the errors, pay 2s.; serve a copy, and if the bail do not justify, or better bail be put in *within four days after notice of the rule*, the plaintiff in the original action may take out execution; but the writ of error still remains, and the plaintiff in error may proceed on his writ, to reverse the judgment notwithstanding.

Exception in twenty days.

If the defendant shall not except to the bail for *insufficiency* thereof *within twenty days next after notice thereof* given to him or his attorney, then such recognizance shall be allowed. *R. M. 5 W. & M.*

When to justify.

If a rule for better bail be served in vacation, you have no occasion to justify, *until the next term*; per Master *Benton*, because bail can never be perfected but in open court.

Same notice to justify as in other cases.

The same notice is allowed to justify in error, as in common cases, *viz.* if they be the same bail as were put in to justify, then *Monday for Tuesday* will do: if added bail, then two days exclusive; and the common notice for justification will do; bespeak the book to go to *Westminster*; make affidavit of the service; give counsel brief to move to justify, 10s. 6d; clerk of the errors 10s. at the house or *Westminster*; if at chambers 6s. 8d. only; if in vacation 2s. more for the judge's

Serjeants-Inn Hall.

judge's clerk; officers of the court qs. 6d. Rule for allowance of the bail must be drawn up at the clerk of the rules, and served.

Of the Rule to transcribe.

The bail being complete, search when the writ of error is returnable (*if no bail is required, this step is the first that defendant's attorney in error takes*); if it is returnable in the same term the allowance is made, then proceed by giving a rule (which you get at Mr. Parry's office) for the plaintiff in error to transcribe, which rule expires in *eight days after service*, pay for it 2s.; serve attorney with a copy.

Rule to transcribe.

After service, leave all the proceedings with Mr. Parry, who makes the transcript therefrom, file your bill the same term the declaration is of, with the clerk of the declarations, if on a judgment by default, if after verdict, no error can be assigned for want of bill being filed.

How to proceed after the rule to transcribe.

Of Amendment after Judgment, if Error brought.

On a writ of error, the King's Bench sends only the transcript to the Exchequer-chamber, and therefore the transcript must be brought back to the King's Bench to be amended by the original record. *Str.* 837. *Rutter v. Redstone.*

The King's Bench only sends a transcript.

Costs are to be paid on amendment, provided the plaintiff proceed no further. 2 *Ld. Raym.* 897. *Barn.* 17. But if amendment be made after verdict by virtue of the stat. of jeofails, no costs are given. *Caf. temp. Hard.* 314. The *posse* may be amended by the judges' notes after final judgment and error brought. 3 *Term Rep.* 749. So where damages are given for a greater sum than laid, and error brought, court will permit plaintiff to enter a *remittitur*, on payment of costs of the writ of error. 1 *H. Black. Rep.* 643. So where defendant pleaded the general issue, and statute of limitations, a verdict was found for plaintiff on the first issue, and no notice taken of the last; after error brought, and joinder (which was assigned on this point), court allowed it to be amended, on payment of costs. 3 *Term Rep.* 659. *Petrie v. Hannay.* *Vide* another amendment, 349. So a judgment may be amended by changing it from *de bonis propriis*, to

Costs.

de bonis testatoris si, &c. after error brought. *Short v. Coffin*, 3 Burr. 2730. *Dougl.* 116. cited. So the name of the plaintiff's attorney in the warrant on the roll, so as to make it correspond with that of the declaration after error brought, and assigned for error. *Richards v. Brown*, *Dougl.* 116. Vide *Barn.* 18. 7. *Salk.* 51. 1 *Str.* 786.

Examination of transcript.

After the copy of the proceedings is left, *the clerk of the errors sends for the transcript money, which being paid, he makes up the transcript of the record, and when ready, he gives it to the attorney for the defendant in error, who takes it to Mr. Edge, at Westminster, to be examined (the attorney attends there for that purpose).* If the clerk of the errors neglects his duty, the clerk of the treasury is to do it for him. *R. T.* 20 *Car.* 1.

Of the Action on the Judgment pending Error.

If the plaintiff brings an action on the judgment pending a writ of error, and he has obtained judgment for want of a plea and execution on it, the court will on application stay the proceedings, as it would be unreasonable that the plaintiff should proceed in execution of a judgment which would of course fall to the ground, in case the original judgment upon which it was founded should be reversed, and restrain also the defendant from bringing a bill in equity. *Taswell v. Stone*, 4 Burr. 2454.

To stay proceedings in action on judgment, bail must first be put in and perfected.

In an action on the judgment pending error, the court held, that the defendant was not in a situation to make any application to stay the proceedings in the action until he had put in bail. *Smith v. Shepherd*, 5 *Term Rep.* 9. Determined in *Bicknell v. Longstaffe*, 6 *Term Rep.* 455., that he must *perfect his bail first*.

Acknowledgment of error brought for delay.

On motion to stay proceedings pending error, it was sworn that defendant had acknowledged that the writ of error which had been depending two years *was for delay*. Court ordered, that upon the defendant's confessing judgment in this action, and undertaking to bring no writ of error thereon, execution should be staid till the determination of the writ of error. And court said, that they could not make him undertake to waive his right in that respect. *Gribble v. Abbot*, *Cowp. Rep.* 72.

Error

Error on a judgment in *C. P.* afterwards error in parliament, they *nonprossed* the first writ of error and motion to stay the proceedings in an action on the judgment pending the second writ. *Buller J.*—It appears by the defendant's own conduct, that the writ of error has been sued out without any foundation for it. Rule discharged with costs. *Entwistle v. Shepherd*, 2 Term Rep. 78.

Pending 2d writ of error, action on the judgment.

After Transcript examined.

The defendant in error cannot transcribe the record. 1 *Wils.* 35.

N. B. If the transcript is not examined in term, you will have the keys of the treasury to pay *extra* 5s. 10d.

After the transcript is examined and complete, the clerk delivers over the same to Mr. *Poole* at Mr. Justice *Heath's* chambers, who is the deputy to *Philip Fonerau*, Esquire, the clerk of the errors in the Exchequer-chamber. In this term, which is the second, defendant's attorney in error applies to Mr. *Poole*, for a rule to alledge *diminution*, which is to be done *in eight days after service*, or a nonsuit may be entered; pay 8d. *per folio*, and 2s. 4d. for rule; serve a copy on the plaintiff's attorney, who must call at Mr. *Poole's* office, and pay the sum demanded; if not, he will require an affidavit of the service of the rule to be tendered to him before he signs a *nonpros* (provided the attorney for defendant in error insists on a *nonpros* before he sends to plaintiff's attorney): but if he sends, and there is no answer the next morning, he will sign *nonpros* of course, and tax the costs.

After made up and examined, to be delivered over to clerk of the errors in Exchequer.

Rule to alledge diminution.

Of alledging Diminution.

The writ of diminution is not an original writ, but issues out of the court where the writ of error is depending; and after diminution is alledged, a *certiorari* issues, whereby the thing is certified. *Cro. Jac.* 130. If the whole record is not certified, or not truly certified, the party injured may alledge a diminution of the record, and cause it to be rectified. But no diminution can be alledged on records out of inferior courts, *Sid.* 40. 7 *Mod.* 103.; but the court may award a *certiorari ad informandum conscientiam*. Errors cannot be entered until the *certiorari* of diminution alledged, and the rule to assign errors is out.

Diminution.

Rule to assign Errors.

Rule to assign errors.

If the plaintiff in error alleges diminution, then in the next term get a rule from Mr. Poole to assign errors (pay 2s. 4d.), which expires in 8 days next after service. Serve plaintiff's attorney with a copy. The common errors, which are best and cheapest, are prepared by Mr. Poole^a, pay him 8s.; but if special, then the plaintiff's attorney draws the assignment; pay counsel 10s. 6d. engross same on a treble penny paper, and file same with Mr. Poole.

^a Or yourself.

Who are to join in assignment of errors.

All the plaintiffs must join in assignment of errors; for an assignment by one is a discontinuance, 2 Cro. 94.; except where the others are severed. Mod. Caf. 40. So they must be assigned in term, and not in vacation. Sty. Praet. Reg. 241. After in nullo est erratum, assignment of general errors shall not be amended. 2 Mod. 304.

Cannot assign contrary to record.

Error cannot be assigned contrary to the record, if it is, judgment must be affirmed. 1 Wilf. 85. Bradburn v. Taylor. 1 Str. 684. Helbret v. Held. 1 Roll. Abr. 758. pl. 8. Where the matter alleged is not by law assignable, there in nullo est erratum is a demurrer in law, as the want of an original after verdict.

If neither plaintiff or attorney be found to serve rule.

If neither plaintiff nor his attorney can be found, the court will order that the rule to assign errors fixed up in the K. B. office, shall be good notice. Str. 417. Leeds v. Power.

Of the Writ of Certiorari.

Certiorari, when necessary.

When, upon error, the original imparlance, warrant of attorney, or other part of the record, is not returned, the plaintiff in error may allege diminution, and have a certiorari for the part not returned. 1 Salk. 267. If a different original is returned, the defendant may allege diminution, and return a true original. 2 Cro. 130. Cro. Car. 91. So if want of original, &c. be assigned for error, the defendant in error may allege diminution, and have a certiorari. 1 Salk. 267. The court may take notice that the record is imperfect, and award a certiorari, for their own satisfaction, before errors assigned. Str. 440. So may award a certiorari to bring the original before them, ad informand. conscient. cur. though no diminution is alleged.

Rep.

Rep. temp. Hard. 118. So in all cases the court may award a *certiorari* for any part of the record not returned or mistaken; for though the party is estopped by plea of *in nullo est erratum*, the court will not be. 1 *Salk.* 270. If return is made that there is no such writ in the office, and a second *certiorari* issue, and return made that there is such a writ, the second return shall be taken. *Ld. Raym.* 1476.

Of what Term the Original is to be.

When all the proceedings are in *one* and the same term, an *original* in *that term* will warrant same; but an original of the term final judgment is given, will not warrant that judgment, if it appear *upon the same record* that there have been *proceedings* of a *preceding term*, as an interlocutory judgment. 1 *Wils.* 181. *Dyke v. Sweeting.* It is sufficient if a warrant of attorney be filed at any time pending the suit.

Of the original writ.

In nullo est erratum.

If the plaintiff assigns error in fact, the defendant may join issue. 1 *Lev.* 80. If the fact assigned for error is no error, *in nullo est erratum*, is a good plea, for it is in the nature of a demurrer, and refers the matter to the judgment of the court. 1 *Lev.* 311. *Telv.* 58. If the plaintiff assigns error in law, the defendant may plead *in nullo est erratum*. And after *in nullo est erratum*, an assignment of general errors shall not be amended. The defendant may plead a release of errors: and such release being in the same instrument with the warrant of attorney, and dated in term in which judgment is entered, is good. *Str.* 1215. *Landon v. Pickering.*

If an error in fact, and an error in law be assigned, the defendant must demur; for this is double. 1 *Lev.* 105. 76. 1 *Roll.* 761. l. 35. 2 *Str.* 975.

Of arguing the Errors.

The next term, being the fourth, the defendant in error (if general errors are assigned) may plead *in nullo est erratum*, which is done by informing Mr. Poole the first day of the term; he also sets down the cause, pay 9s. 6d. and moves to affirm the judgment. N. B. You may now apply for interest to be added in the Exchequer-chamber, but such application is made by

Setting down for argument.

by special motion. Wait four days after affirmance (exclusive), then apply to Mr. *Poole* to tax the costs; pay according to the length of the pleadings; when the costs are taxed, issue out execution, but, before it is returnable, apply to him for the transcript and file, which take to the *King's Bench* Treasury, and pay 2s. 6d.

Real errors.

In case there are real errors assigned, draw a joinder, engross and file it with Mr. *Poole*, then pursue the following rule:

When copies of error and record are to be delivered to the judges of the Common Pleas and Exchequer.

It is ordered, that no copy of error and record thereupon be delivered to the justices or barons, before the attorney for the plaintiff upon the writ of error shall give *ten days notice to the clerk of the errors in the Exchequer-chamber*, that the error assigned in the record is to be argued before the said justices and barons for both parties, and that the attorney for the plaintiff shall deliver *four copies* to the justices of the Common Pleas, and the attorney for the defendant shall deliver *four other copies* to the barons of the Exchequer, *four days before the hearing the cause.* R. E. 33 Car. 2.

How to proceed if cause to be heard.

In this case Mr. *Poole* makes a copy of the proceedings in error for both parties, so as to enable them to make copies, and deliver to the justices pursuant to the above rule; the cause is set down by Mr. *Poole* without motion for a *concilium*; pay 9s. 6d. and give copies to counsel. If the plaintiff in error does not set them down, the defendant may; if the judgment is affirmed, the costs are taxed by Mr. *Poole* four days after, exclusive; then sue out execution.

As to Interest.

The Exchequer-chamber is bound to allow double costs to the defendant in error on the affirmance of a judgment of the K. B.; but it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance. *Shepherd v. Mackreth*, 2 H. Black. Rep. 284.

The motion.

It seems the mode at the time of the affirmance, is to let counsel move for a rule to shew cause why it should not be referred to the clerk of the errors, to calculate and ascertain the amount of the interest upon the final judgment, after the rate of 4l. per cent. from the time of final judgment being entered up, until the affirmance of said judgment in this court; and that such interest may be added

added to the damages for which such final judgment was entered up; the rule is drawn up by Mr. Poole, serve it, make affidavit thereof, and then move to make it absolute.

Of the Days for hearing of Errors.

The Exchequer-chamber is a branch of the court of Exchequer, in which there are no more than two return days in every term: one is called the *general affirmance day*, being appointed by the judges of the *Common Pleas*, and barons of the court of *Exchequer*, to be held a few days after the beginning of every term, for the *general affirmance* or *reversal of judgments*. The other is called the *adjournment day*, which is usually held a day or two before the end of every term; and on the first of these days, judgments are affirmed, or reversed, or writs of error nonprossed. The intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed, or reversed, or writs of error nonprossed, on paying 16s. extraordinary to the clerk of the errors, and setting down the cause for affirmance *two days before the adjournment day*; the clerk of the errors charging 9s. 6d. for every cause set down for the general affirmance day, and 1l. 5s. 6d. for the adjournment day.

Of the days for hearing causes in Exchequer-chamber.

Afterwards, to wit, on next after in this same term, comes the said *R. C.* by *J. F.* his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said *A. B.* to have and maintain his aforesaid action thereof against the said *R. C.* There is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said *A. B.* against the said *R. C.* Whereas, by the law of the land, the said judgment ought to have been given for the said *R. C.* against the said *A. B.* And the said *R. C.* prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored

Common assignment of errors in the Exchequer-chamber.

to all things which he hath lost by occasion of the said judgment, &c.

W. Baldwin.

Certiorari.

Certiorari to certify diminution of bill, bail, and warrant of attorney.

To be engrossed on a 10s. stamp parchment signed with M^{rs}. Provost and Webb, and seal it.

George, &c. To our trusty and well-beloved *Lloyd* lord *Kenyon*, our chief justice assigned to hold pleas in our court before us, greeting: Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in our court before us by bill, between *A. H.* and *J. G.* of a plea of trespass on the case, it is said, manifest error hath happened, to the great damage of the said *J.* as by his complaint we have understood; the record and proceedings of which said judgment we have lately caused to be brought before our justices of our common bench, and our barons of our Exchequer, of the degree of the coif, to correct the errors in the same, according to the form of the statute in such case made and provided, in the chamber of our Exchequer aforesaid; and the said *J.* appearing in the same Exchequer-chamber hath said, that whereas by the record aforesaid sent to the same justices and barons it appears, that the said *A.* in *Trinity* term, in the 36th year of the reign of his present majesty, exhibited into the said court of our said lord the king, before the king himself, her bill against the said *J.* in the plea aforesaid, and that the said *J.* was in the custody of the marshal of our *Marshalsea* before us; nevertheless the said *J.* at or before the time of exhibiting the bill of the said *A.* was not in the custody of the marshal of our *Marshalsea* before us; neither was any bail ever filed for him in the said court; nor any such bill, and the continuances thereon, indorsed in our said court, of the same term, before us of record remaining: And that whereas by the record aforesaid so as aforesaid sent, it also appears that the said *A.* constituted one *R. F.* her attorney against the said *J.* in the plea aforesaid; nevertheless the said *J.* hath said that the said *R. F.* had no warrant of attorney thereon on record filed; and we being willing to be certified of the premises aforesaid, in this behalf, command you that the files of the bails of the county of *Middlesex*, and of the bills in the said *Trinity* term in the 36th year aforesaid, in your custody, and also the rolls and other memorandums of the warrants of attorney

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attorney of the same term, in your custody of record likewise remaining, being searched, what of the said bail, bill, and continuances thereon indorsed, and warrant of attorney aforesaid, you shall find, to our justices and barons aforesaid, immediately into the chamber of our Exchequer aforesaid, you certify, together with this writ. Witness Sir *James Eyre*, knight, &c.

N. B. Writs issuing out of the Exchequer-chamber are always witnessed by the chief justice of the *Common Pleas*.

The like writ will issue where there is the want of original assigned for error (which see in Error from *C. P.* to *K. B.*); only vary it by this precedent.

As to Interest being allowed against Bail.

The plaintiff recovered a judgment in *Hil. Term.* 1784, for 800*l.* the defendant brought error in the *Exchequer-chamber*, and put in bail. In *Nov.* 1785, judgment was affirmed, and an action of debt was brought against the bail in same term, and plaintiff recovered. The bail required indulgence, and granted. The question was, Whether the plaintiff was entitled to interest from the bail on the sum recovered between the time of signing the judgment in the *K. B.* and the affirmance in the *Exchequer*, as interest for the whole time, since the time of signing the final judgment, had been levied against the bail? *Buller J.*—This is not an application to a court of equity, but to a court of law, to enforce the performance of an engagement which the bail have entered into. The recognizance they entered into is with a condition, that the defendant in the original action shall prosecute his writ of error, and that if judgment should be affirmed, they will pay the debt and costs upon the former judgment, together with such costs as are occasioned by the delay. So that the bail in express terms only promise to pay what was due upon the original judgment, and the costs given in the *Exchequer-chamber*; therefore we are not warranted in giving any more. In *Bodily v. Bellamy*, 2 *Burr.* 1094. it is laid down, that when final judgment is given by the court, the demand is liquidated and no interest can be computed after that time. In *Wilford v. Davison*, 4 *Burr.* 2127. it was held, that on affirmance of judgment in error, bail are not liable for more than they have undertaken to pay; namely, the

In debt upon a recognizance of bail in error in *Exchequer-chamber*, the bail are not liable to interest between the time of signing judgment below, and the affirmance, but they are liable to interest after the affirmance.

the debt and costs which have been adjudged due. As to interest due *subsequent* to the time of the affirmation, that stands on a different ground; because when the judgment is affirmed, it becomes, from that time, the debt of the bail; and if an action were brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. *Frith v. Leroux & an.* 2 Term Rep. 57.

Error from the Common Pleas into the King's Bench.

4th Edit.

Transcript.

Original to be
bespoke before
the effoign day
of the succeeding
term.

The method of proceeding to obtain this writ, &c. is particularly stated in my *Instructor Clericalis* in the *Common Pleas*, from p. 772, as far as the delivery over the transcript to the K. B.

Although 8 days are mentioned in the rule to transcribe, it is the duty of the officer to transcribe sooner if he can; and as soon as the record is brought into court, the defendant in error may proceed upon it. *Sambidge v. Housley*, 2 Term Rep. 17. And if the record is brought in vacation, it is a record of the preceding term.

No curfitor shall make any original writs of any return past, unless he receive instructions *within the term wherein they are to be returnable*, or at farthest *on or before the effoign day of the next succeeding term*, without warrant from the lord chancellor or master of the rolls. *Lord Clarendon's Orders in Chancery*.

The proceedings shall not be staid, because the chief justice has not signed the return. *Str. 1063. Blackwood v. South Sea Company*.

How to proceed after Transcript filed.

The transcript being complete, it is delivered over by Mr. Hough (who is very expeditious in these cases) with the writ of error annexed to Messrs. *Provost and Webb*, in order for the parties to take copies if they think proper; but it is necessary for the defendant in error to bespeak his, as he will want it in the future stage of the business. The transcript being filed, the cause is in the court of *King's Bench*. This then warrants the defendant in error to take proper steps to obtain his execution. Therefore the next step is to sue out

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out a writ of *scire facias quare executionem non*, calling on the plaintiff to shew cause why execution should not be adjudged to the defendant in error; but before the transcript is actually filed, there can be no such writ issued. *Rep. temp. Hard. 351.*

This writ is directed to the sheriff of the county where the cause of action is laid, *viz.* in declaration.

This writ is made returnable on a general return day, wherefoever, &c. if the original proceedings were by original; but if by bill or attachment, in that case the *sci. fa.* must be returnable on a day certain. for it ought to pursue the nature of the first process. *Eden v. Wills, 1 Stra. 694. 2 Ld. Raym. 1417*; and if the transcript be brought in before the *essoign* day of any term, may bear *teste* the last day of the preceding term, and made returnable the first day of the next, 1 *Term Rep. 17.*; and if brought in within the term, may bear *teste* the first day of the term, and 15 days between the *teste* and return of both, will do. The *alias* cannot issue before the return of the first *sci. fa.* and to be tested the *quarto die post* of the first, *Salk. 599. 6 Mod. 86.* if proceedings by original; if by bill, on the return day.

Sci. fa. to be returnable on a general return day, where the proceedings be by original, aliter if by bill or attachment.

The writ of *sci. fa.* is to be engrossed on a 3s. 6d. stamp, signed by Messrs. *Provost* and *Webb*; a *præcipe* is to be made, pay him 1s. 8d. seal 7d. take it to the sheriff's office; if a *nihil* is returned, pay 1s. each name; if left for a *scire feci*, he makes out a summons to his bailiff, pay 2s. 4d. officer 5s. return 2s. each defendant's name. If there be two *sci. fa.*'s, the last need not lie four days in the office before the return, nor for a *scire feci*. 3 *Burr. 1723. Miller v. Yerraway.*

To be engrossed and left for return.

On the return day of the *scire facias*, if the defendant is warned, or upon a *nihil* returned on the *alias*, give a rule thereon, which is for the plaintiff in error to appear thereto, he having no day given him by the writ of error for that purpose at the clerk of the rules, on a piece of plain paper thus: *In error, "C. D. against A. B. rule on sci. fa. J. A. attorney;"* pay for same 1s. 10d. which expires in four days, *exclusive of the day given (Sunday, and a dies non excepted)*; on which day if he does not appear, (which is done on a slip of paper delivered to the defendant's attorney as on other *sci. fa.*'s,) execution may issue, but the

On return to give rule for judgment.

defendant's attorney cannot sign a *nonpros* for costs until he has given another rule, viz. a rule to assign errors, which is done by applying to the master for that purpose, who will give it on the back of the draft of the *sci. fa. quare*, &c. enter it with the clerk of the rules, pay 1s. 10d. serve copy on plaintiff's attorney, and if he does not deliver his assignment of errors within the four days exclusive allowed by the rule, then sign a *nonpros*. There can be no *nonpros* signed without a rule to assign errors. *Leith v. McFurlan*, 3 Burr. 1772.

It is irregular to rule the plaintiff to assign errors before the expiration of the rule to appear to the *sci. fa.*

It was held, the rule to appear and rule to assign the errors might be both given on the same day, being both for the same purpose, viz. to compel plaintiff to assign errors. *Sambidge v. Housley*, 2 Term Rep. 17. But this point came on again to be argued in *Trinity* term 1795, which was as follows: In *Hilary* 1795, defendant in error obtained judgment in *C. P.* The plaintiff sued error, returnable last *Easter* term. Record having been certified in *E. vacation*, defendant four days before this term, being *T. T.* 35 Geo. 3. sued out a *scire facias quare executionem non*, tested the last day of *Easter* term, and returnable the first return of this term, and gave notice thereof. On the first day of this term, being 5th *June*, the defendant in error gave a rule on the *sci. fa.*, and on same day another rule for the plaintiff to assign errors on the record. The reporter states the former of these rules expired on a *Wednesday*, the latter on *Tuesday*, the day preceding the expiration of the other rule. The plaintiff obtained a rule to shew cause why the rule to assign errors should not be discharged. Lord Kenyon.—It seems to me, that these rules are inconsistent. The plaintiff in error is called upon to assign errors, before he is required to appear in this court. The latter rule should precede the former. *Rules abs.* *James v. Staples in error*, *Trin. T.* 1795. This determination is agreeable to the antient authorities as well as the practice, and also agrees with the entry on the roll.

N. B. It appears to me, that both the rules expired on the same day, being given on *Friday*.

A rule to assign errors was set aside, because given before any rule on *sci. fa.* *Marshall v. Cope*, 2 Str. 917. 2 Barn. K. B. 60. *S. P.*

A plea

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A plea, that the damages recovered were levied on a *fi. fa.*, was pleaded to *sci. fa. quare*, &c.; it was set aside on account of the apparent delay that it would introduce.—*Strange* said, that it never was the intent of the court to give the party a liberty to plead to it, when it was only a method used to bring in the party to assign his errors, and if allowed, it would be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an issue to the *sci. fa.*, whilst the writ of error stood still for want of an assignment of errors. In the debate it was said by the court and secondary, if issue had been joined on this plea, and it had been found for defendant in error, he might have taken out execution, but could not nonpros the writ of error till after a rule to assign errors. *Parker v. Stanton*, Ld. Raym. 1414; 1 Str. 679. To a *sci. fa. quare*, &c. payment was pleaded, which was set aside. *Elmes v. Martin*, Hil. 10 Geo. 1. *Ibid.*

A plea to a *sci. fa. quare*, &c. of *fi. fa.* levied for the damages, is bad; so is a plea of payment. Must assign errors.

By these determinations it appears, that within the four day rule on the *sci. fa.*, an assignment of errors must be delivered, or execution may issue; and for the plaintiff in error to get his costs in error, he is compelled to proceed to give a rule to assign errors afterwards.

If no Assignment.

If the plaintiff in error delivers no assignment of errors on the expiration of the rule given, which must be before four in the afternoon, of the 5th day after rule to appear entered (*Sunday* not being the last day of the rule), then the defendant will be at liberty to take out his execution. *Yelv. 7.*

If no assignment, then how to proceed.

If the plaintiff in error suffers the execution to go for want of assigning the errors in due time, the defendant may notwithstanding go on for his costs, which may be done by obtaining a rule from the master on the back of the *sci. fa.* to assign errors, enter it at the clerk of the rules, and serve copy, pay for the rule 1s. 10d. if no assignment delivered within the four days (one day inclusive, and the other exclusive), then sign a *nonpros*, all the proceedings must be entered on the roll beginning with the copy of the transcript, as of the term the transcript is of, sign judgment at the *King's Bench* office on a double half-crown

stamp, tax the costs with the master who marks the costs on the roll, therefore the roll must be complete before he does it.

Of assigning Errors.

If assignments,
how.

Few parties after transcript suffer the writ to be nonprossed, especially if real errors exist, but will assign errors, which is signed by counsel, engrossed on a treble penny paper, and delivered over to the opposite attorney.

If want of original assigned,
how to proceed.

If the errors assigned are for want of an original warrant of attorney, &c. or some other matter necessary to render the record perfect or complete, which is termed alledging diminution of the record, then it lies on the defendant to force the plaintiff to return the writ of *certiorari*, which is done by application to the master, who will give the rule on the back of the draft of *sci. fa. quare executionem non*, which must be entered by the clerk of the rules, pay 1s. 10d. serve copy on the plaintiff's attorney. 1 Salk. 267. This is a four day rule.

Certiorari to be
made by plaintiff.

The plaintiff's attorney on service of this rule must make out the *certiorari*; sign it with Messrs. *Provoost* and *Webb*, pay 1s. 8d. seal 7d. and leave it with the *custos brevium* of the *Common Pleas* to certify; when returned, it is to be filed with the clerk of the treasury at *Westminster*. The defendant's attorney searches for it there, and if returned, bespeaks a copy of it.

If not returned,
how to proceed.

If the *certiorari* is not returned and filed by the time appointed by the rule, the benefit of it is lost, 1 Salk. 267.; and the defendant may join in error, by pleading *in nullo est erratum*, and enter a *non misit breve* on the record, without taking any notice of the diminution; and the assignment of error, as to that part, is void. The defendant at his own expence cannot take out the *certiorari*. *Comyn's Rep.* 115.

Teste of certiorari.

The *certiorari* must not bear teste before the errors are assigned. *Ld. Raym.* 1554. 2 Str. 819. And after a *certiorari* has been returned, no second *certiorari* can issue without motion in court by counsel. *R. E.* 11 Car. 1. This means by the plaintiff in error.—But if a variant original is returned on the first, the defendant in error may sue out a second. *Salk.* 266. *Vide Str.* 765. *Com.* 118.

Of Joinder in Error and Argument.

If special errors be assigned, defendant may join in error, which need not be signed by counsel; engross and deliver the same over on treble penny to the plaintiff's attorney. The like if general errors be assigned.

If errors are special.

After joinder either party may move the court for a *consilium* (counsel), 10s. 6d. the rule must be drawn up at the clerk of the rules, pay 4s. 6d.; and the proceedings are to be entered on the roll, as of the term the transcript is of; Mr. *Austin* will mark the roll, and enter the cause for argument, as on demurrer; serve copy of the rule on the opposite attorney, docket the roll at the *King's Bench* office, and file it in the treasury.

After joinder, how to proceed.

Of the Entry on the Roll.

The whole proceedings are to be entered on *King's Bench* rolls the term the transcript is of, beginning with the writ of error, to the end of the final judgment in the C. P. then add the assignment of errors and joinder; make copies of the whole proceedings as on the roll for the judges, the same as on a demurrer. At the top of the roll write *As yet of* term 36 Geo. 3. *Witness Lloyd lord Kenyon.*

Entry.

The plaintiff is to deliver two copies to the chief justice and senior judge, the defendant two other copies to the other judges. *R. M. 17 Car. 2.* Pay each clerk 2s.; they are to be delivered *two days* before argument.

And copies for argument.

N. B. Counsel must have a copy of the paper-book to move for judgment, or argue the errors.

If plaintiff's attorney neglects to deliver the books on his part, defendant in error may deliver all; then judgment will be given of course against the plaintiff; defendant draws up the rule at the clerk of the rules, for judgment; pay 4s.; stamp it with a double half-crown stamp, and the master will tax the costs without a bill, but you must have the roll for him to mark, bespeak it of the clerk of the treasury, to bring it to the master.

If plaintiff's attorney neglects to deliver books.

There is no rule given for judgment in this case; but the judgment of the court of *K. B.* must be entered thereon, before the costs can be taxed.

No rule for judgment.

Of Interest.

It is now settled that the party is to pay interest on the judgment. 2 Term Rep. 78.

Rule absolute to compute interest, &c.

In *Zinckes v. Langton* a rule was made absolute, in affirmance in the K. B. for the master to compute interest on the sum found from the day of signing final judgment below, and to be added to the costs taxed on the affirmance. Dougl. 752. in notes.

If general Errors assigned.

If general errors assigned.

It may happen that the plaintiff in error will not assign the want of an *original*, &c. or pray a *certiorari*, therefore in that case the general assignment, "that the judgment is given for plaintiff, whereas it ought to have been given for defendant," is made; in that case you may deliver the joinder on a treble penny stamp forthwith, and move for a *consilium*, as before, without a rule to return the *certiorari*.

Joinder.

The defendant in error voluntarily takes notice of the assignment of errors, by delivering his joinder in *nullo est erratum*. If assignment of errors is delivered, a rule to join in error may be given by the master, to force defendant in error to proceed^a.

Rule to join in error.

Scire facias quare executionem non.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. B.* lately in our court, before Sir *James Eyre*, knight, and his companions, our justices of the bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against *C. D.* late of *Westminster*, in your county, yeoman, 47l. 10s. for his damages, which he sustained by occasion of the not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster*, in your county, as for his costs and charges by him about his suit in that behalf laid out, whereof the said *C.* is convicted, as by the record and proceedings thereof, which we lately caused to be brought into our court before us, for certain causes of error, manifestly appears; and now on behalf of the said *A.* we have been informed in our said court before us, that

The return of this is to be guided by the original proceedings. Str. 694.

^a The writ of *sci. fa. ad audiendum errores* is now out of use, as defendant in error appears *gratis*, or plaintiff may compel him to join in error by the above rule. *Cartb.* 40. *Mosley v. Corks*.

although

although judgment be thereon given, yet execution of the damages aforesaid still remains to be made to him the said *A.* whereupon the said *A.* hath humbly besought us, that we should provide him a proper remedy in this behalf; and we being willing that what is just and right should be done in this particular, commaend you^a, that by honest and lawful men of your bailiwick, you make known to the said *C. D.* that he be before us on _____ wheresoever we shall then be in *England*, to shew if he has or knows of any thing to say for himself, why the said *A.* ought not to have his execution against the said *C.* for the damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what our said court before us shall then and there consider of him in this behalf, and have there the names of those by whom you shall so make known to him, and this writ. Witness *Lloyd lord Kenyon*, at *Westminster*, the _____ day of _____ in the 36th year of our reign. *Mansfield and Way.*

^a In the alias say, "as before we have commaended you."

Middlesex. Sci. fa. quare, &c. between *A. B.* plaintiff in error, and *C. D.* defendant, returnable on _____ wheresoever, &c. *J. B.* attorney.

Præcipe.

To be signed by Messrs. *Provest* and *Webb*, pay 1s. 8d. seal 7d.

After judgment, a writ of error was brought, allowed, and served; afterwards defendant in error became a bankrupt, and his assignees sued a *scire facias quare executionem non*; motion to quash the writ. *Buller J.*—The rule is, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose. Here the assignees should have gone on with the writ of error in the bankrupt's name till judgment. *Rule absolute. Kretchman v. Beyer, 1 Term Rep. 463.*

After error allowed, defendant in error became bankrupt, assignees to proceed in bankrupt's name.

_____ term, in the 36th year of the reign of king *George the third.* *Mansfield and Way.*

C. D. } Afterwards, that is to say, on _____
agt. } next after _____ in _____
A. B. } this same term, before our lord the king at _____
3 A 4 *Westminster,*

Assignment of errors, that there is no original writ filed of

cord where error
from C. P. to
K. B.

Westminster, comes the said C. D. by J. B. his attorney, and says, that in the record and proceedings aforesaid, and also in the giving of the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said A. B. to have or maintain his aforesaid action thereof against the said C. D. ; there is also error in this, to wit, that by the record aforesaid it appears, that the said C. D. was attached to answer to the said A. B. in the plea aforesaid, yet no original writ between the parties aforesaid, in the plea aforesaid, is filed of record, nor remains of record in the said court of the said lord the king of the bench at *Westminster* aforesaid ; therefore in that there is manifest error : I here is also error in this, that it appears by the record aforesaid, that the judgment aforesaid, in form aforesaid given, was given for the said A. against the said C. whereas, by the law of the land, the said judgment ought to have been given for the said C. against the said A. ; and the said C. prays a writ of the said lord the king to be directed to the *custos brevium* of the said court of the bench at *Westminster*, to certify to the said lord the king the truth of the same, and it is granted to him, &c. And the said C. prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing ; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

A. Chambre.

The like for the
want of warrants
of attorney assigned.

If you assign the want of warrants of attorney for error, go to the end of the general errors and say,
“ there is also error in this, to wit, that there is no
“ warrant of attorney filed of record, nor remains of
“ record in the court of the lord the king of the
“ bench at *Westminster*, between the parties aforesaid
“ in the plea aforesaid, to warrant the said J. K. to
“ be attorney for the said A. B. against the said C. D.
“ in the plea aforesaid ; therefore in this there is manifest error ; and the said C. prays a writ of the
“ lord the king to be directed to the chief justice of
“ the said court of the bench, to certify to the said lord
“ the king the truth of the same, &c. ; and it is granted
“ to him, &c. ; and the said C. prays, &c.” as above.”

George

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George the third, &c. To our right trusty and well-beloved Sir *James Eyre*, knight, our chief justice of the bench, greeting: We being willing for certain causes to be certified, whether *A. B.* made *J. D.* gentleman, his attorney on record, against *C. D.* late of *W.* in the county of *Middlesex*, yeoman, in a plea of trespass on the case, before you and your companions, our justices of the bench aforesaid, do command you, that you search the records, and other remembrance rolls, of warrants of attorney, for the county of *Middlesex*, being in your custody, filed of record of term, in the year of our reign; and what you shall find therein, concerning the said warrants of attorney between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wherefoever we shall then be in *England*, as fully as the same remains in your custody, together with this writ. Witness *Lloyd* lord *Kenyon*, &c.

Mansfield and *Way*.

Middlesex. Certiorari to certify a record of warrants of attorney between *A. B.* plaintiff, and *C. D.* late of, &c. defendant: returnable without delay.

George the third, &c. To our right trusty and well-beloved holding the office of keeper of the writs, rolls, and records of our court of the bench, greeting: We being willing for certain causes to be certified, whether any original writ between *A. B.* and *C. D.* late of *Westminster*, in the county of *Middlesex*, yeoman, in a plea of trespass on the case, be filed in your custody or not, do command you, that you search our original writs, directed to our sheriff of *Middlesex*, and which are filed of record in your custody of term (the term the original is returnable), in the 36th year of our reign, and what you shall find therein of an original writ issued between the parties aforesaid, of the plea aforesaid, you certify to us without delay, wherefoever we shall then be in *England*, together with the return and indorsement thereon, as fully as the same remains in your custody; and have there this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the day of in the 36th year of our reign.

Mansfield and *Way*.

Middlesex.

Certiorari to certify warrants of attorney.

To be engrossed on 10s. stamped parchment, signed by Messrs. *Provoost* and *Webb*, 1s. 8d. seal 7d.

Præcipe.

Certiorari to certify the original.

10s. stamp.

Præcipe.

Middlesex. Certiorari to certify the record of an original between *A. B.* plaintiff, and *C. D.* defendant: returnable without delay.

C. D. } *Trinity* term, in the 36th year of king
agt. } *George* the third.
A. B. }

Mansfield and *Way*.

Assignment of
general error.

Afterwards, to wit, on next after
in this same term, before our lord the
king at *Westminster*, comes the said *C.* by *A. K.* his
attorney, and says, that in the record and process
aforesaid, there is manifest error in this, to wit, that
the declaration aforesaid, and the matters therein con-
tained, are not sufficient in law for the said *A.* to have
or maintain his aforesaid action thereof against him
the said *C.*; there is also error in this, to wit, that by
the record and process aforesaid, it appears, that the
judgment aforesaid, in form aforesaid given, was given
for the said *A.* against the said *C.* whereas by the law
of the land, the said judgment ought to have been
given for the said *C.* against the said *A.*; and the said
C. prays that the judgment aforesaid, for the errors
aforesaid, and other errors in the record and proceed-
ings aforesaid, may be reversed, annulled, and altoge-
ther held for nothing, and that he may be restored to
all things which he hath lost by occasion of the said
judgment, &c.^a *J. M.*

Errors in fact
and law may be
assigned.

The plaintiff may assign for error, an error in fact,
or errors in law, *F. N. B.* 20. *e.* On error in fact
assigned, plaintiff may conclude with an averment,
for defendant may put in issue if he pleases. 1 *Burr.*
410. But he cannot assign both; for this will be
double. 1 *Sid.* 147. 1 *Lev.* 105. 76. If error in
fact and in law be assigned, as that the defendant was
an infant at the time of the promises being made, and
also appeared by attorney, the defendant may demur
specially, and judgment will be affirmed. *Burdett v.*
Wheatley, 2 *Ld. Raym.* 883. Where errors in fact
are assigned, you must insist upon them only, and can-
not take any advantage, or have any issue joined upon
errors in law.

If both, may de-
mur.

How to proceed
if error in fact
assigned.

Upon issue taken of error in fact, you may proceed
to trial as in other common cases, and if found for
the plaintiff on trial, he must move to put the cause

^a Although special errors are assigned, yet if they are all errors in
law, you must conclude with the general errors,

in the paper for argument, and then, on producing the *poslea*, the court will give judgment of reversal. In this case the defendant may carry the cause to trial without *proviso*.

And hereupon afterwards, to wit, on next after in the year of the reign of our said lord the king, the said *A.* by his said attorney, freely comes here into court, and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said court of our said lord the king, now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above for error assigned: and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed: But because the court of the said lord the king, now here, is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid to come before the said lord the king on wheresoever, &c. to hear the judgment aforesaid, for that the court of the said lord the king, now here, is not yet advised thereof, &c.

Joinder in nulla est erratum.

Need not be signed by counsel.

Which said writ of *certiorari* so prayed and granted, follows in these words, to wit: *George* (here set forth the writ of *certiorari* verbatim. *Mansfield and Way*); then say, Which said chief justice of the bench aforesaid, returned and certified unto the said lord the king, that by virtue of the said writ, he had searched the records, and other remembrance rolls of the warrants of attorney for the said county of *Middlesex* in his custody, filed of record of term, in the year of the reign of the said lord the king, and that there is an original writ issued against the said *C. D.* at the suit of the said *A. B.* in the plea aforesaid, in his custody filed of record, which said writ he the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, which said schedule so annexed to the said writ of *certiorari*, follows in these words, to wit (here set forth the schedule verbatim); which said writ of *certiorari*, together with the return thereof, among the records of term aforesaid is filed; and hereupon afterwards, to wit, on next after in the year of the reign of the said lord the king, the said *A.* by his attorney aforesaid, freely comes

Joinder in error where the want of an original is assigned.

No counsel's hand is requisite.

Continuance.

^a The day of
concilium.

Joinder where
the want of a
warrant is assign-
ed.

Entry of affirma-
nce of the judg-
ment in K. B.

comes here into court, and says, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of the said lord the king, now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid for error assigned, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed; but because the court of the said lord the king, now here, is not yet advised what judgment to give of and upon the premises aforesaid, a day is given therefore to the parties aforesaid, to come before the said lord the king on ^a to hear the judgment aforesaid, for that the said court of the said lord the king, now here, is not yet advised thereof, &c.

As before, to the end of the *certiorari*. *Mansfield and Way*: Which said chief justice of the bench aforesaid returned, and certified unto our said lord the king, that by virtue of the said writ of *certiorari*, he had searched the records and other remembrance rolls of the warrants of attorney for the county of *Middlesex*, in his custody, filed of record of term, in the year of the reign of the said lord the king, and that there was a warrant of attorney to warrant the said *J. D.* to be attorney for the said *A. B.* against the said *C. D.* in the plea aforesaid, in his custody, filed of record of the term aforesaid; the tenor of which said warrant of attorney, as fully as the same remained in his custody filed of record, he the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, as the said chief justice was in the said writ of *certiorari* commanded: which said schedule, so annexed to the said writ of *certiorari*, follows in these words, to wit (*the rolls of attornies, &c.*), here copy the schedule; then say, which said writ of *certiorari*, together with the return thereof, among the records, of term aforesaid is filed. And hereupon (as in the former).

At which day, before the lord the king at *Westminster*, came the parties aforesaid by their attornies aforesaid: Whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said *C.* above for error assigned, being seen and fully understood by the

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the court of the said lord the king, now here, and mature deliberation had thereupon: it appears to the court of the said lord the king, now here, that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid: Therefore it is considered by the said court of the said lord the king, before the king himself, that the judgment aforesaid, given in form aforesaid, be in all things affirmed, and do stand in its full strength and effect (the said causes above for error alledged in anywise notwithstanding): And it is further considered, that the said *A.* recover against the said *C.* 14l. adjudged to him at his request, by the court of the lord the king, now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained by reason of the delay of the execution of the judgment aforesaid, and by the prosecution of the said writ of error, and that he may have execution thereof, &c.

Judgment signed
day of
17

Though a transcript of the record is only removed into the *K. B.* on a writ of error from the *C. P.* the *King's Bench* award the execution. *Vicars v. Haydon*, *Cowp. Rep.* 843.

K. B. award execution on affirmation.

At which day, before the said lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid, whereupon as well the record and proceedings aforesaid, and the judgment aforesaid, in form aforesaid given, as the matter aforesaid, by the said *C.* for error assigned, being seen and fully understood by the court of the said lord the king, now here, and mature deliberation had thereupon; for that it appears to the court of the said lord the king, now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, *there is manifest error*: Therefore it is considered, that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings, be reversed, annulled, and altogether held for nothing; and that the said *C.* be restored to all things which he hath lost by occasion of the judgment aforesaid, &c.

Judgment of reversal.

Afterwards, to wit, on next after in this same term, before the lord the king at *Westminster*, comes the said *A. B.* by his attorney aforesaid, and says, that execution of the judgment aforesaid still remains to be made unto him: Therefore he prays the writ of the lord the king to be directed to the

The entry of a nonpross after scire facias quare executionem non in error for want of assigning errors in *K. B.*

the sheriff of the county of *Middlesex* aforesaid, that he cause to be made known to the said *C. D.* to be before the said lord the king wheresoever, &c. to shew if any thing he has or knows to say for himself, why the said *A. B.* ought not to have execution of his damages, costs, and charges aforesaid, according to the form and effect of the judgment aforesaid; and it is granted to him, &c.: Therefore the sheriff is commanded, that by good and lawful men of his bailiwick, he make known to the said *C. D.* that he be before the lord the king (the return of the *scire facias quare*, &c.) wheresoever, &c. to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said *A. B.* &c. at which day the said *A. B.* by his attorney aforesaid, comes before the lord the king at *Westminster*, and offers himself against the said *C. D.* in the plea aforesaid, and the sheriff (to wit) esq. and esq.

sheriff of the said county of *Middlesex*, returns that by virtue of the said writ to him directed, by *J. W.* and *W. P.* good, &c. he has given notice to the said *C. D.* to appear, &c. to shew as by that writ he was required; and the said *C. D.* being solemnly called, doth not come, but makes default; and hereupon the said *A. B.* says, that the said *C. D.* hath assigned no error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid: therefore a day is given to the parties aforesaid, to come before the lord the king, on , that is to say, for the said *C. D.* to assign error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid.

Scire feci.

Plaintiff in error
makes default.

Judgment signed
day of
17

At which day, before the said lord the king at *Westminster*, comes the said *A. B.* by his attorney aforesaid: and the said *C. D.* being solemnly called doth not come, but again makes default, nor has he farther prosecuted the said writ of error against the said *A. B.*: Therefore it is considered, that the said *A. B.* recover against the said *C. D.* as well his damages aforesaid, as also 17l. adjudged to him by the court of the said lord the king, now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he has sustained by occasion of the delay of execution of the judgment aforesaid, by means of the prosecution of the said writ of error, and that the said *A. B.* have execution thereof, &c.

In the *Exchequer-chamber*, these entries are all made by Mr. Poole.

The writ of execution on these judgments must be issued in the county where the original venue was laid, and if in any other county, a *testatum* is to issue, and to ground it, the first writ must issue, and may afterwards be returned.

To be issued in the county where venue laid.

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick of *C. D.* you cause to be made 56l. which *A. B.* lately in our court before us at *Westminster*, by bill without our writ, and by the judgment of the same court, recovered against the said *C. D.* for his damages, which he had sustained, as well by reason of the not performing

certain promises and undertakings made by the said *C.* to the said *A.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C.* is convicted, as appears to us of record; and also 1l. which to the said *A.* in our court of *Exchequer chamber* at *Westminster*, before our justices of the bench, and the barons of our *Exchequer* of the degree of the coin there, according to the form of the statute lately made and provided, were adjudged for his damages, costs, and charges, which he had by reason of the delay of the execution of the judgment aforesaid, by the pretence of the prosecution of our writ of error brought in the premises by the said *C.* against the said *A.* the said judgment being there in all things affirmed, of which the said *C.* is also convicted; as by the record and proceedings of our said justices and barons by them had in the premises, and by them remitted into, and now remaining in our said court before us at *Westminster*, also appears to us of record:

And have you the said monies before us at *Westminster*, on next after

A ca. fa. for ditto.

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take *C. D.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, on next after

to satisfy *A. B.* recol. for his damages which he hath sustained; as well by reason of the not performing

And have there then this writ. Witness, &c.

Mansfield and Way.

after to render to the said *A.* for his damages
aforesaid ; and have there then this writ. Witness, &c.
Mansfield and Way.

If on a *nonpros*
for not assigning
errors in the
Exchequer-
chamber,

If it is on a *nonpros* for not assigning errors, then go to the end of the first recovery and say, " And also 11l. adjudged to the said *A.* in our said court of *Exchequer-chamber*, by our justices of our court of *Common Bench*, and our barons of our *Exchequer* of the degree of the coif, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he hath sustained by reason of the delay of the execution of the judgment aforesaid, on pretext of prosecuting our writ for correcting of error, brought in the premises, because the said *C.* did not prosecute the said writ with effect, of which the said *C.* is also convicted, as by the record and proceedings of our said justices and barons by them had in the premises, and by them remitted to and remaining in our said court before us at *Westminster*, also appears to us of record. And have you there then this writ. Witness, &c.

For not assign-
ing errors from
C. P. to K. B.

If it is from the *Common Pleas* in the *King's Bench*, for not assigning errors, then as follows :

Fi. fa. in Case.

George the third, &c. to the sheriff of *Middlesex*, greeting : We command you that you cause to be levied of the goods and chattels of *C. D. late of, &c. yeoman*, in your bailiwick, 200l. which *A. B.* lately in our court before Sir *James Eyre*, knt. and his brethren, then justices of our court of *Common Bench*, recovered against the said *C.* for his damages which he had by means of the not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster* in your county,

Ca. fa. in Case.

George, &c. to the sheriff of *Middlesex*, greeting : We command you, that you take *C. D. late of, &c. yeoman*, if he be found in your bailiwick, and safely keep him, so that you have his body before us at *Westminster*, on wherefoever we shall then be in *England*, to satisfy *A. B.* 600l. for his damages which the said *A. B.* lately in our court, before Sir *James Eyre*, knt. and his brethren, then his Majesty's justices of the bench at *Westminster*, recovered against the said *C.* for

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ERROR.

ty, whereof the said *C.* is convicted,

for his damages which he sustained by reason of the not performing certain promises and undertakings, made by the said *C.* to the said *A.* at *Westminster* in your county, whereof the said *C.* is convicted,

as by the inspection of the record and proceedings thereof, which we lately caused to come into our court before us at *Westminster*, for certain causes of error, and now there remaining, it appears to us of record: And also 111. which were awarded to the said *A.* in our court before us at *Westminster*, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had sustained by occasion of the delay of execution of the said judgment, on pretext of prosecuting the said writ for correcting errors brought by the said *C.* against the said *A.* of and upon the premises aforesaid, because the said *C.* did not prosecute the said writ with effect, whereof the said *C.* is convicted, as appears to us of record:

And have you the said money before us, on

And have you there this writ. Witness, &c.

wheresoever we

Mansfield and Way.

shall then be in *England*, to render to the said *A.* for

(To be sealed only.)

his damages, costs, and charges aforesaid, and this writ. Witness, *Lloyd lord Kenyon*, &c. *Mansfield and Way.*

Fi. fa. in Debt upon Affirmance in the *King's Bench*, from *C. P.*

Ca. fa. in Debt upon Affirmance in the *King's Bench*, from *C. P.*

George the third, &c. to the sheriff of *Middlesex*, greeting: We command you, that you cause to be made and levied of the goods and chattels in your bailiwick of *C. D. late of Westminster in your county*, *yeoman*, as well a certain debt of 401. which

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that you take *C. D. late of Westminster* in your county, *yeoman*, if he be found in your bailiwick, and him safely keep, so that you have his body before us on the mor-

A. B.

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A. B. lately in our court, before Sir *James Eyre*, knight, and his brethren, our justices of the bench at *Westminster*, recovered against the said *C.* as also 10*l.* for his damages which he sustained by reason of the detaining the said debt,

row of *All Souls*, where-soever we shall then be in *England*, to satisfy *A. B.* as well a certain debt of 28*l.* which the said *A. B.* lately in our court, before Sir *James Eyre*, knt. and his brethren, our justices of the bench, at *Westminster*, recovered against the said *C.* as also 16*l.* which, in our said court of the bench, were adjudged to the said *A. B.* for his damages which he sustained by occasion of the detaining the said debt,

Return to be as the original proceedings were; if by original, then on a general return day, wheresoever, &c. if by bill or attachment, then on a day certain.

whereof the said *C.* was convicted, as by the record and proceedings thereof which we lately caused to come into our court before us, for certain causes of error, now there remaining, appears to us of record: And also 14*l.* which were adjudged to the said *A.* in our said court before us at *Westminster*, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had by occasion of the delay of the execution of the judgment aforesaid, by the pretence of the prosecution of our writ of error brought by the said *C.* against the said *A.* of and upon the premises aforesaid, upon which said writ of error, the judgment aforesaid, against the said *C.* being in our said court before us, in all things affirmed, whereof the said *C.* is also convicted, as appears to us likewise of record:

And have you the said monies before us on

wheresoever we shall then be in *England*, to render to the said *A.* for his debt and damages, costs and charges aforesaid, and also this writ. Witness, &c.

Mansfield and Way.

If you want a *testatum*, see title *Execution*.

George, &c. to the sheriff of *M.* greeting: Whereas *A. S.* lately, that is to say, in *Trinity* term, in the 35th year of our reign, in our court, before Sir *James Eyre*, knt. and his companions, then our justices, at *Westminster*, by our writ, and by the consideration of

Writ of restitution on reversal by the K. B. of a judgment given in the C. P. and si. fa.

our

our said court, recovered against *J. O.* late of, &c. 100*l.* which in our said court of the bench were awarded to the said *A.* for her damages which she had been put unto about her suit in that behalf, whereof he is convicted, as by the record and proceedings thereof which we lately caused to be brought into our court before us, for certain causes of error, appears to us of record. And whereas we, by reason of divers errors in the said record and proceedings, and also in giving the said judgment, have reversed and totally annulled the same: It is therefore considered and adjudged in our said court before us, that the said *J.* be restored to all things he hath lost by occasion of the said judgment: And for that the said *A.* sued out execution upon the said judgment, and he the said *J.* was thereupon taken in execution for the same, and detained in prison until payment was made to the said *A.* of the said 100*l.* Therefore we command you

and ca. fa. for money paid.

Fi. fa.

Ga. fa.

that of the goods and chattels of the said *A.* in your bailiwick you cause to be made and levied the said 100*l.* and have you that money before us, on wheresoever

that you take the said *A.* if she shall be found in your bailiwick, so that you may have her body before us, on where-soever, &c. to satisfy to the said *J. O.* for the said

Qu. If this must not be moved for, or a *sci. fa.* issued before it can be sued out?

Return to be as the original proceedings are.

&c. to restore to the said 100*l.* *J.* the said 100*l.* so adjudged to him, by our said court, before us, upon the reversal of the said judgment; and have there this writ. Witnesses, &c.

Where the money appears upon the record to be levied and paid to the party, the defendant shall have restitution without a *sci. fa.* *Salk.* 588.

If judgment is reversed, the party shall be restored to all that he has lost, and a writ of restitution shall be awarded. 2 *Cro.* 698. Vide 4 *Mod.* 161. as to the value sold for.

Restitution,

If the money is levied and not paid, a writ of restitution shall not go against the sheriff without a *sci. fa.* *Salk.* 588.

Error quod corum vobis resident?

If a judgment is given in this court, and it be erroneous in matter of fact, and not in law, this writ may

Lies for error in fact.

be brought returnable here to reverse it; for error in fact is not the error of the judges, and therefore the reversing of a judgment given by them which is only erroneous in matter of fact, is not reversing their own judgment: But it is otherwise in matter of law, for they cannot be thought to reverse their own judgments.

If an infant appear by attorney, he may have this writ to reverse the judgment.

If, for instance, an infant appear by attorney, and judgment be given against him, he may have this writ to reverse it: In this case, a *præcipe* is to be made for the curfitor of the county where the *venue* is laid, and when the same is sealed, it must be allowed by the master in open court, and then the clerk of the rules will draw up a rule for that purpose, which being served on the attorney for the original plaintiff, is a *superfedeas* to the execution, on the plaintiff in error putting in and justifying his bail within four days next after such allowance.

Rule for allowance.

It is ordered, that the writ of error issued between the parties in this cause be allowed: And upon the plaintiff in error putting in and justifying his bail within four days next ensuing, that further proceedings be staid on the judgment in the original action, until the said writ of error now depending between the parties be determined.

By the Court.

There needs no *superfedeas* to this writ, as the rule stays the execution, although it is laid down in all the books the contrary.

It is said also, that this writ may be allowed in vacation by the master, but I think not.

An infant ought to have a guardian appointed by the court to prosecute the writ, as in other cases, before assignment of errors; vide *Coke's Entries*, title *Error*; and he should assign them by guardian.

Rule to assign errors.

When the writ is returnable, apply to the master for a rule to assign errors which he will give in this form: *A. B. v. C. D.* "Unless the plaintiff in error assigns errors within four days next after notice given to him or his attorney, a nonpros may be signed;" which take to the clerk of the rules to enter, pay 1s. 10d. he will write the word *entered* upon it; serve copy on the attorney. The errors to be assigned must be *facts only*; proceed to trial as in common cases, and the defendant in error may carry the cause down to trial without *proviso*.

N. B.

N. B. There needs no *scire facias* in this case to compel plaintiff in error to assign errors. If the issue is found for the plaintiff in error, he must move to put the cause in the paper for argument, and then upon producing the *poslea*, the court will give judgment of reversal.

If error abates, or is discontinued, after the record itself is removed, there shall be a new writ *quæ coram vobis residet*. *Yelv.* 6. *1 Rol.* 753. *l.* 40.

When error abates, this writ may be sued.

If error be quashed for any fault but variance, error *coram vobis* lies. *Str.* 606. *Cooper v. Ginger.* *Ld. Ray.* 1403.

If error be quashed.

Error *coram vobis* lies not after affirmance in the Exchequer-chamber. *Str.* 975. *Burleigh v. Harris*, 690. *Contra* 940.; except upon a fine, *Salk.* 337.

It must be entered upon the same roll with the first, that the court may see altogether. *Cro. Eliz.* 155. 281.

Error in Parliament^a.

A Writ of error that is brought in parliament is made returnable immediately, or upon a prorogation *ad proximum parliamentum*, because that court, during the session of it, sits continually, and has no vacation, and it is for the honor of that high court to be immediately attended, that they may do the speedier justice. The proceedings there are very expeditious, there being no *scire facias quare executionem non*; but when the transcript is brought in, on a motion in the house by a peer, a day is appointed for the plaintiff in error to assign his errors, and after issue is joined on *in nullo est erratum*, upon another motion their lordships appoint a day for hearing the errors; at which day both parties must attend with their counsel, but neither party must have more than two. *Sty. Pract. Reg.* 235.

How a writ of error in parliament is made returnable.

The writ it made out by the curfitor of the county where the *venue* is laid; pay him 6l. 3s. 6d. if no private seal, and the curfitor procures the warrant from the king: make a *præcipe* for it, take it to Mr. Parry's office, and he will allow it, pay 4l. a copy of

How to sue it out.

Allowance.

^a It shall not be allowed without the king's warrant, for which 5l. is paid, and 4l. for the writ. *Godb.* 247.

If bail be required, how to proceed.

which serve on the attorney for plaintiff in the original action.

If bail is required, it is to be put in before a judge of the *King's Bench*, apply to Mr. *Parry* for that purpose, and give notice thereof; if the defendant in error is dissatisfied, he may have a rule for better bail at Mr. *Parry's*; serve copy, the opposite attorney then gives notice of justification, apply to Mr. *Parry* to bring down the book, give affidavit of service of notice to counsel to move to justify, draw up the rule for the allowance at Mr. *Abbot's*, the clerk of the rules, and serve copy. As soon as parliament sits, get a rule to transcribe at Mr. *Parry's* office, serve copy on the opposite attorney, it expires in *eight days* after service; the defendant's attorney leaves the pleadings with the clerk of the errors to make up the transcript, who will send to plaintiff in error for the money; when the transcript is examined, the chief justice of the *King's Bench* conveys the roll with the transcript to the House of Lords, (his fee is 4l.) and leaving the transcript there, takes back the roll. 4 *Inst.* 21. *Dy.* 375. 1 *Roll.* 753. l. 20. 2 *Cro.* 341. *Godb.* 247.; Mr. *Parry* attends the chief justice to the house.

Serving the bail below with a writ on the recognizance, *pending the writ of error*, is a contempt and breach of privilege. *Peer W.* 685.

Waste.

Court of *K. B.* will oblige defendant to enter into a rule not to commit waste or destruction, pending the writ of error. *Wharod v. Smart*, 3 *Burr.* 1823.

Court will not permit execution to be taken out pending error in parliament, on the ground that error is brought for delay, because there was no argument in the Exchequer-chamber, and judgment affirmed there.

Motion for leave to take out execution, notwithstanding error in parliament was pending, on an affidavit, that after judgment recovered here, defendant removed the record in the *Exchequer-chamber*, where judgment was affirmed, without argument or objection, which was contended it was equivalent to a confession that there was no error, and that the writ of error was brought for delay. *Court.*—The mere circumstance of the defendant not arguing the case in the *Exchequer-chamber*, is by no means conclusive; since in some of the cases that have been most litigated in the House of Lords, the parties have waived all argument in the *Exchequer-chamber*. *Rule refused.* *Harrison v. Grotte*, 6 *Term Rep.* 400.

It seems on inquiry, that an agent in error may be employed to conduct the writ of error in parliament,

or the attorney may do all this himself; but the fees to the clerk in parliament, *Henry Cooper*, esq. must be paid; his office is in *Old Palace-yard*, opposite *Westminster-hall*.

No *scire facias* issues for the assignment of errors, but on a motion made by a peer, a day is appointed for the plaintiff to assign errors; he is allowed *eight days* next after service. If errors are not filed in the parliament-office, the clerk of the parliament will get it *nonprossed*, and make out a *remittitur* of the transcript, which is filed in the *King's Bench* by the attorney.

No *sci. fa.* issues to compel an assignment of errors.

If the plaintiff in error alleges diminution, and prays a *certiorari*, the same is to be issued without any motion, and to be returned in ten days; which, if not done, or good cause shewn to the house to the contrary, the plaintiff will lose the benefit of his writ.

If plaintiff alleges diminution, a *certiorari* is to be issued in ten days.

1 *Salk.* 267.

To obtain a hearing, the plaintiff in error must get a peer to move the house, that on assigning errors, the defendant may appear and make his defence.

Argument.

If the house be likely to get up soon, after assignment of errors, on pleading *in nullo est erratum*, the clerk in parliament will get a peer to move the house to appoint a short day for the hearing of the cause.

How to get a short day appointed.

The cases must be drawn up and signed by counsel on each side, which are afterwards printed, and two hundred and fifty on each side are delivered at the parliament-office, two days before the hearing at the least, some of which are given to the lords, as also the judges; three hundred on each side are generally printed. The lords examine the errors with the assistance of the judges, in all affairs of weight and nicety. On the hearing, the lords either affirm or reverse the judgment; on which the clerk of the parliament draws a *remittitur* of the transcript of the record into the *K. B.* which is signed by counsel, and entered with the affirmance or reversal; and the court below award execution, &c.

Cases must be drawn up, and signed by counsel, and printed.

If judgment below be given for the plaintiff, and deemed right, it need only be affirmed. *East India Company v. Todd*, 1788.

If the judgment of the court of *B. R.* be deemed erroneous, it is sufficient simply to reverse it. *Pugh v. Goodtitle*, May 1787.

3 B 4

If,

New bail to be given in parliament.

If, on a judgment in the *Common Pleas*, a writ of error be brought in the *King's Bench*, and bail put in thereon, and judgment affirmed, and afterwards a writ of error be brought in parliament, the party must give a new recognizance, for the first does not include costs to be assessed in the House of Lords. *Salk.* 97. *Str.* 527. *Colebrooke v. Diggs.*

Costs.

The House of Lords give sometimes very large, sometimes very small costs in their *discretion*, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below, and the practice is to give interest from the day of signing the judgment to the day of affirming it there, computed according to the *current*, not according to strict legal, rate of interest. 4 *Burr.* 1097. *Bodily v. Bellamy.*

Only a transcript is sent to House of Lords.

In a writ of error from the *K. B.* to the House of Lords, only a transcript of the record is sent up; and when remitted, the *King's Bench* award execution. *Vicars v. Haydon*, *Cowp. Rep.* 843.

If judgment below was given for defendant upon demurrer, and the judgment be reversed, whereupon a writ of inquiry becomes necessary in such case, the lords cannot award the writ, but the record is remitted to *K. B.* for them to award the inquiry, and upon return thereof then to give final judgment. *Ibid.*

Standing Orders of the House.

Orders on writs of error in parliament.

Errors to be assigned in eight days, or nonpross and remittitur.

If diminution alleged and certiorari prayed.

Ordered, That the plaintiffs in all writs of error after the records be brought in, shall speedily repair to the clerk of the parliament, and prosecute their writs of error, and satisfy the officers of this house their fees justly due, and shall assign errors within eight days after the bringing in such writs with the records; and if the plaintiffs make default so to do, then the said clerk, if the defendant in such writs require it, shall record that the plaintiff hath not prosecuted his writ of error, and that the house doth therefore award that such plaintiff shall lose his writ of error, and the defendant shall go without day, and that the record be remitted; and if in any writ of error the plaintiff shall allege diminution, and pray a *certiorari*, the clerk shall enter an award thereof accordingly; and the plaintiff may, before in nullo est erratum pleaded, sue forth the writ of *certiorari* in ordinary

dinary course, without special petition or motion to this house for the same; and if he shall not prosecute such writ, and procure it to be returned *within ten days next after his plea of diminution put into this house*, then, unless he shall shew good cause for the enlarging the time for the return of such writ, he shall lose the benefit of the same; and the defendant may proceed, as if no such writ of *certiorari* were awarded. *Ordo dom. procer. die Veneris, 13th Decemb. 1661.*

Certiorari to go without motion, and be returned in ten days,

or lose benefit thereof, and defendant to proceed as if none awarded.

That no person presume to deliver any printed cases to any lord, unless signed by one or more of the counsel who attended the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house. *Ordo dom. procer. die Martis, 19 April 1698.*

No cases to be delivered unless signed by counsel.

It is ordered, That when a day shall be appointed for the hearing of any cause, appeal, or writ of error, the same shall not be altered but upon petition; and that no petition shall in such case be received, unless *two days notice* be given to the adverse party, of which notice oath shall be made at the bar of this house. *Ordo dom. procer. die Mercur. 22 Decemb. 1703.*

No putting off a day of hearing, without notice of two days, and oath thereof.

That when diminution shall be alledged, and a *certiorari* prayed and awarded before *in nullo est erratum* pleaded, the clerk shall, upon request, give a certificate that diminution is so alledged, and a *certiorari* prayed and awarded thereupon. *Ordo dom. procer. die Veneris, 21 Feb. 1717.*

Certificates to be given of *certiorari*'s being awarded concerning writs of error.

That at the hearing of causes, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read, which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply. *Ordo dom. procer. die Sabbat. 2 Mart. 1727.*

How counsel are to proceed.

That in all cases of appeals and writs of error, they continue and are to be proceeded on in *statu quo*, as they stood at the dissolution of the last parliament. *Die Martis, 18 Mar. 1678-9.* So by prorogation, *2 Lev. 93.; Contra Carth. 237.*

Error doth not determine by dissolution or prorogation. *T. Raym. 383.*

Ordered, That in all cases on appeal, or writs of error appointed to be heard, the appellants and respondents, the plaintiffs and defendants, or their re-

Printed cases to be delivered.

pective agents or solicitors, do deliver to the clerk of the parliament, or clerk assistant, to be distributed to the lords of this house, the printed cases upon such appeals or writs of error at least two days before hearing; and that no other or different cases in any such causes, be at any time afterwards printed or delivered. 18th Dec. 1724.

Appeals to be heard in course as they stand appointed.

All appeals, not determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they shall stand to be heard at the end of this or any other session, without any new application to the house to appoint a day for hearing same: And that such of the said appeals as shall stand first to be heard at the end of this or any other session, shall stand to be heard on the first Monday after the first day of the next session or meeting of parliament, the 2d upon the Wednesday, the 3d upon the Friday following, and from thence the rest in course upon every Monday, Wednesday, and Friday, until they shall be heard and determined. 5th April 1734.

Ordered, That on the days causes are appointed to be heard, the cause be the first business proceeded on after prayers, and no other business to intervene. 28th June 1715.

Assignment of errors.

Afterwards, that is to say, on the day of in the 36th year of the reign of our sovereign lord George the third, king of Great Britain, &c. before the king himself in parliament, the said A. by J. K. his attorney, comes and says, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, as in other assignments exactly. To be engrossed on treble penny parchment, and delivered to the clerk in parliament, signed by counsel.

A test. si. fa. in case on a judgment affirmed in parliament.

George the third, &c. To the sheriff of Middlesex, greeting: Whereas we lately commanded our sheriffs of London, that they should cause to be made and levied of the goods and chattels of C. D. late of esq.; the sum of £. which A. B. esq. lately in our court before us at Westminster, by our writ, and by the judgment of the same court, recovered against the said C. D. for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings made by the

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the said *C. D.* to the said *A. B.* as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* was convicted, as appeared to us of record in our said court before us, and also

l. which to the said *A. B.* in our court of parliament, according to the form of the statute lately made and provided, were adjudged for his damages, costs, and charges, which he had by reason of the delay of the execution of the judgment aforesaid, by means of the prosecution of our said writ of error, the said judgment being in our said court of parliament in all things affirmed: whereof the said *C. D.* is convicted, as by the inspection of the record and proceedings thereof from our said court of parliament into our court before us remitted, appears likewise to us on record, and that our said sheriffs of *London* should have the aforesaid monies before us at *Westminster* at a certain day now past, to render to the said *A. B.* for his damages, costs, and charges aforesaid: And our said sheriffs of *London* at that day returned to us, that the said *C. D.* had not any goods or chattels in their bailiwick, whereof they could cause to be levied the said damages, or any part thereof; whereas it is sufficiently testified in our said court before us, on the behalf of the said *A. B.* that the said *C. D.* hath sufficient goods and chattels in your bailiwick, whereof you can cause to be levied the damages, costs, and charges aforesaid: Therefore we command you, that of the goods and chattels of the said *C. D.* in your bailiwick, you cause to be levied the aforesaid sums of

l. and *l.* and that you have the said monies before us, on wheresoever, &c. to render to the said *A. B.* for his damages, costs, and charges aforesaid; and have you there also this writ. Witness *Lloyd* lord *Kenyon*, at *Westminster*, the day of in the 36th year of our reign. *Mansfield* and *Way*.

When the Writ of Error abates.

In a writ of error, if the plaintiff in error dies, the writ shall abate; so if there are several plaintiffs, and one dies, the writ shall abate, 11 Co. 135. 1 Vent. 34.; because the writ of error is to set persons in statu quo

- quo* before the erroneous judgment given below, and this either before or after errors assigned. *Salk.* 219. But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he is only to defend it. *Bridg.* 78. *Yelv.* 208. *Sid.* 419. *Vent.* 34. 1 *Ld. Ray.* 244. But the plaintiff in error must issue a *scire facias* against the executors to hear errors; and then, and not before, may proceed to reverse the judgment. 1 *Vent.* 34. 2 *Bulst.* 231. *Show.* 186.
- If defendant.** If he that brings error discontinues before the defendant plead, he may have a new writ of error; but, if he discontinue his writ after the defendant hath pleaded *in nullo est erratum* to it, he cannot have a new writ; for then the defendant hath joined issue upon the writ brought; but, before plea, he may, for the bringing of the new writ is but the abatement of the former, and no wise prejudicial to the defendant.
- Discontinuance.** If error abates by the death of the chief justice, or of the parties, the second writ shall be a *superfededent*. 3 *Keb.* 466. It is said leave will be given to take out execution if the chief justice dies. 1 *Barn.* 139, 140.
- Chief justice.** The plaintiff in error married, whereby her writ abated; court gave defendant leave to take out execution without time to bring error *coram vobis*. *Str.* 1015. *Jenkins v. Bates.* *Ibid.* 880.
- Marriage.** If errors are assigned before defendant's death, the executor must proceed as if defendant was living, till judgment is affirmed, and then revive by *scire facias*; but cannot take out execution pending the writ of error. *Barnes* 347. *Wright v. Trewzeke.*
- Ven. fac. de novo.** A court of error may award a *venire facias de novo*. *Dougl.* 722. *Grant v. Asple.*
- If judgment on demurrer reversed, B. R. to award inquiry.** If judgment below was given for defendant, upon demurrer, and the judgment be reversed, whereupon a writ of inquiry becomes necessary; in such case, as the lords cannot award such writ, the record is remitted to *B. R.* for them to award the inquiry, and upon return thereof, then to give final judgment. *Ld. Raym.* 9, 10. *Carth.* 319.

Of Costs in Error.

By 8 & 9 *W. 3. c. 11.* If verdict for the defendant, and it is affirmed on error brought, the defendant shall have costs.

But on reversal of a judgment, no costs are allowed, because it would be hard that any person should pay the costs occasioned by error in the judgment of the court below. *Str. 617. 2 Mod. 314.* Reversal.

By 3 *H. 7. c. 10.* If tenant defendant, or other bound by judgment, sue out a writ of error in delay of execution, and discontinue, be nonsuited or have judgment affirmed, he shall pay costs and damages at the discretion of the justices. Defendant to pay costs.

Error of a judgment on the statute of usury, on affirmance, it was held, that though no costs were given in the original action, yet the court declared that the defendant in error was entitled to the costs by the express words of 3 *H. 7. c. 10. Str. 1084. Ferguson v. Rawlinson qui tam. Cro. Eliz. 609. 1 Vent. 38.* Though no costs in original action, yet there must be costs in error.

If error be quashed for variance or other defect, costs are given by stat. 4 & 5 *Ann. c. 16. Str. 606.* Of quashing writ.

By stat. 13 *Car. 2. c. 2.* If error be brought of a judgment after verdict, and the judgment be affirmed, the defendant in error shall have double costs. If judgment affirmed.

If an executor brings error upon a judgment against his testator, and after affirmance moves to pay principal, interest, and costs, he shall not pay costs in error. *Str. 1072. Rep. temp. Hardw. 367. 1 Vent. 166. 1 Mod. 77.* But if after a *devastavit* he brings error, he shall pay costs on affirmance. *Str. 977. Caswell v. Norman.* Executors.

On error on a bond given in *India*, *B. R.* will direct the damages to be computed, by adding to the costs *India* interest (9 per cent.) till signing the judgment, and legal interest (5 per cent.) from that time, on the accumulated sum ascertained by the judgment. *2 Burr. 1094. Bodily v. Bellamy.* Interest.

An avowant is not a plaintiff within 3 *H. 7.* and is not entitled to costs or damages on the affirmance by a court of error of a judgment in his favor. *Carth. 122. 4 Mod. 7. 1 Salk. 95. 205.* Avowant not entitled to costs.

Costs

Costs on quashing.

Costs on quashing writs of error are to be given in all cases. *Str.* 606. *8 Mod.* 305.; but not on an amendment of the writ.

Inrolling Deeds.

How to get a deed inrolled.

THE deed intended to be inrolled must be taken to a judge; if it be a bargain and sale, one of the parties must acknowledge his execution of the deed, either in court or before a judge at his chambers; but if the deed requires the judge's *fiat* only, then the party need not attend; the deed must be left with the judge, who with his own hand delivers it in court to the secondary, and orders him to inrol it; it may be done in term time, or in vacation.

The entry.

As yet of the term of *Saint Michael*, 37 *Geo.* 3. Witness *Lloyd* lord *Kenyon*.

To be inrolled, if a bargain and sale, within six months *from the date*, computing twenty-eight days per month. *2 Inst.* 678.

The day it was delivered into court.

England, (fs.) "Be it remembered, That on the
" 10th day of *November*, in this same term, before the
" lord the king at *Westminster*, Sir *Nash Grose*, knight,
" one of the justices of the lord the king, before the
" king himself, came into the court of the said lord
" the king, before the king himself, and recordeth,
" that on the ^a day of 1796,
" at *Serjeants-Inn*, in *Chancery-lane*, *London*, came
" *A. B.* in his proper person, and brought before the
" same justice then there, a certain indenture, which
" he acknowledged to be his deed; and prayed that
" the same indenture might be inrolled of record in
" the said court as his deed; which said indenture the
" aforesaid justice, by his own proper hands, hath
" now delivered into court here, to be inrolled, and
" it is inrolled in these words, to wit, This indenture
" (here insert the deed *verbatim*, copying every word,
" with the names of the parties, and making the following
" mark for seals, +, put the sealing and delivery with the witnesses' names also). When copied and examined, these words are to be indorsed upon the deed:

^a The day of the acknowledgment of the deed.

" Inrolled in the court of our lord the king, before
" the king himself, of *Michaelmas term*, in the 37th
" year

"year of the reign of king George the third." Roll 560.

Then a docket of a deed is to be made upon a slip of paper in this form :

The entries of J. K. gentleman, one, &c. of the term of Saint Michael, 37 George 3. 1796.

Middlesex, (fs.) Indenture of bargain and sale, Docket, dated the day of 1796, and made between A. B. of, &c. of the one part, and C. D. of, &c. of the other part, of ten messuages and six acres of land, with the appurtenances, in the parish of F. in the said county. Roll. 560.

ADDENDA.

A D D E N D A.

CASES of TRINITY TERM 36 GEO. 3. *not before inserted.*

If attorney required to answer the matter of an affidavit, swear in his exculpation to an incredible story, court will grant an attachment though he positively deny the malpractices imputed to him.

Bail bond.

If the defendant, who has given a bail-bond to the sheriff, tender himself to the sheriff before the return of the writ, the bail-bond considered as if no such bond had been given: *sed qu.* But in this case the rule to bring in the body was discharged on the ground of a writ of *superfedeas* having issued for not declaring.

THE defendants were called on by rule to answer the matters of certain affidavits imputing malpractices to them, who denied the charges *positively and pointedly*; it was insisted, that the rule must be discharged. Court were of opinion, that it was not sufficient to answer the charge in direct terms, for that if the story represented by defendants were *not credible*, an attachment must be granted against them. And the story told by these defendants appearing to the court highly *incredible*, an attachment was granted. *In re Crofsley and others, attornies.*

Under an original writ *in a plea of trespass on the case* on promises, the sheriff took a bail-bond conditioned for the defendant's appearance, &c. in a *plea of trespass*; and held good. *Owen v. Nail, 6 Term Rep. 702.*

In *Trin.* vacation 1795, defendant was arrested, and gave a bail-bond. On the day of the return of the writ, in order to discharge his bail, he voluntarily surrendered himself to the sheriff; after the return of the writ, plaintiff demanded an assignment of the bail-bond, which the sheriff refused, on the ground that the defendant was in custody. On 22d *February*, the defendant was discharged by *superfedeas*, the plaintiff not having declared against him. The sheriff was ruled to return the writ on 17th of *February*, and he returned *cepi corpus*, then he was ruled to bring in the body. Motion in *Easter* term, for a rule to shew cause why the rule to bring in the body should not be discharged.—Court thought, that as the defendant had voluntarily surrendered himself to the sheriff *before the return of the writ*, it was a legal surrender, the sheriff having the defendant in his custody to answer the exigency

exigency of the writ. And that at all events this rule must be made absolute, the sheriff being bound by the *superfedeas* to discharge the defendant out of his custody. Rule *abs.* *Jones v. Lander*, 6 Term Rep. 753. N. B. With great submission, I always took the law to be, if the sheriff once takes the bond for appearance, the exigency of the writ is answered, as such, he has no power after over the defendant; and a render to the sheriff after such liberation is bad. If the plaintiff had brought an action against the sheriff for not assigning the bond, the render of the defendant after its execution, I apprehend, (although on the return day of the writ to him.) could not have been received in evidence as a legal excuse, or pleaded in discharge of the bond.

The case of the churchwardens of *Edmonton v. Osborne*, in 6 Term Rep. 689. was, Whether the demand of a plea could be made at the time of delivering the declaration: the court held it might. I have a note, under the hand of Master *Benton*, in the following words: "A demand of a plea cannot be made, until after the rule to plead be given." Vide p. 248. Mr. *Forster* agrees with Master *Benton*. I take it, the plaintiff is not in a condition to demand a plea until his rule is entered; or why is there a necessity for the rule at all? The practice of the C. P. is with Master *Benton*.

As to the demand of plea.

It is ordered, That, from and after the last day of the term, the parish church of the parish of *St. George the Martyr*, within the borough of *Southwark*, in the county of *Surrey*, and the church-yard adjoining thereto, shall be within and part of the said rules. R. T. 36 Geo. 3.

As to the K. B. prison.

A declaration in ejectment was served on the wife of the tenant, at her husband's house in *Belbroughton*, the parish where the premises lay; but it was not stated in the affidavit, that this house was on the premises. Question was, Whether it was good service? Court held it sufficient. And Lord *Kenyon* added, If the declaration be served on the wife of the tenant in possession, it is sufficient, though that service be not on the premises; and the reason why it is necessary to state in the affidavit, that the service was on the wife at the husband's house, is to shew that they were living together as man and wife, and that by such

Ejectment may be served on the wife on the premises, or at husband's house.

service the husband may have notice of the proceedings. *Doe dem. Morland v. Bayliffe*, 6 Term Rep. 765. But where it was not stated in the affidavit, that the service on the wife was either on the premises, or at the husband's house, rule was refused. *Oates dem. Chatterton v. Cotes*, 1bid.

Case in C.P.
on motion to
refer a declara-
tion to prothono-
tary to strike
out the unneces-
sary counts,

In *Michaelmas* term 1794, an action in the C. P. was brought for neglecting to insure a ship from *New York* to *Jamaica*, and back to *America*. The declaration consisted of six special counts, the three money counts at full length, and an *insimul computasset* one hundred and fifty sheets. After appearance entered, the defendant moved to refer the declaration to the prothonotary to strike out the unnecessary counts, on Serjeant *Runnington's* opinion, there being only a small variation in the four latter special counts in the stating the voyage. The first and second counts stated it to be a voyage from *New York* to *Jamaica*, and back to *America*. *Eyre C. J.* observed, that the motion was premature, that it would come better *after the trial*; for if the plaintiff failed in the cause, he would have to pay the costs for his folly, in making his declaration so long; and if the defendant failed, he might then apply to have the unnecessary counts struck out: and the rule was discharged. At the trial the plaintiff prevailed; the motion was again brought on in the *Michaelmas* term following, and the court were of opinion, that there were unnecessary counts in the declaration; and said, they wished it to be understood that they should discountenance in future all unnecessary length in pleadings, but as this was the *first* application of the kind (after trial), they should not make any rule in the present case. *Hurd v. Cook*, *Michaelmas* term 1795.

N. B. I may venture to say, that this motion has been common in both courts, for upwards of a century, after appearance entered. Vide *R. M.* 1654, f. 16. *Cooke's Rep. C. B.* 128. 344. *Barn.* 335. *Rep. temp. Hard.* 129. refused after rule to plead expired. *Cowp.* 665. 727. 2 *Burr.* 1188. There was no evidence at all given on the four last counts.

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I N D E X.

Of *dilatory Pleas*, and *Pleas* to the
Action.

THEY are either to the jurisdic-
tion, the disability of the
plaintiff, or in abatement to the
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Of cognizance ibid.

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On a plea of *misnomer* if issue be
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Declaration must be taken out of
office first ibid.

Pleas to jurisdiction 254

When to be pleaded ibid.

They must be pleaded in four days
inclusive, if declaration be de-

livered four days before end of
term Page 254

Plea in abatement may be pleaded
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The four days both inclusive ibid.

What shall be a special imparlance
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If plea in abatement be irregular,
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In every plea to the jurisdiction,
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- When no alteration made by death of either party, no abatement 669
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 If two or more plaintiffs sue, the death of one shall not abate the action *ibid.*
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 Death of either party between verdict and judgment is not error, provided the judgment be entered up *within two terms* 669
- Death of either party before *assize*, the suit abates, but if *after* the *assizes*, though before trial, it does not *Page 669*
 In ejectment defendant died between the first day of the assizes and verdict; judgment good *ib.*
 Ejectment against baron and *feme*, baron dies between the day of *nisi prius*, and the day in bank, it is good against the *feme* *ibid.*
 If *feme* takes husband after verdict, and before the day in bank, she shall have judgment, but a *sci. fa.* must be sued out *ibid.*
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